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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY, a Corporation,
Petitioner

v.

FEDERAL POWER COMMISSION, *et al.*, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM E. MILLER
1100 Shoreham Building
Washington 5, D. C.
Counsel for Petitioner

Of Counsel

STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

Panhandle Eastern Pipe Line Company (Panhandle), petitioner herein, respectfully prrys that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered February 25, 1955 dismissing petitioner's petition to review and set aside an order of the Federal Power Commission.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 56)* has not yet been reported. Opinion 276 and accompanying order issued October 1, 1954, by the Federal Power Commission in Docket Nos. G-2306, et al., entitled "In the matters of American Louisiana Pipe Line Company; Texas Gas Transmission Corporation; Michigan Wisconsin Pipe Line Company; Michigan Consolidated Gas Company" (App. 16) have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit dismissing the petition for review was entered February 25, 1955. (App. 61). In the time allowed by the applicable rule, petitioner filed a petition for rehearing which was denied March 21, 1955. (App. 74) Issuance of the mandate has been stayed for a period of 30 days pursuant to rule 36 of the Rules of the United States Court of Appeals for the Third Circuit to enable this petitioner to make application to this Court for a writ of certiorari to review the decision.

Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254(1). The following cases sustain the jurisdiction of this Court to review the judgment in this case.

Federal Communications Commission v. *Sanders Brothers Radio Station,* 309 U.S. 470.

National Broadcasting Company v. *Federal Communications Commission,* 319 U.S. 239.

QUESTIONS PRESENTED

The single question presented is whether the petitioner is a party "aggrieved" by an order issued by the Federal Power Commission and therefore entitled to obtain review of such order in the Circuit Court of Appeals under Section

* Appendix references are to a separate appendix volume accompanying this petition.

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19(b) of the Natural Gas Act, 15 U.S.C. Section 717r(b), 52 Stat. 831.

Underlying this question are the following questions:

(1) Is a natural gas company whose existing market is threatened by the intrusion of a new competitor an aggrieved person within Section 19(b) of the Natural Gas Act; or, conversely, is it necessary that such an existing seller be actively attempting to expand its existing market, in order to obtain review of a Commission order allowing a new pipeline to supply the same market?

(2) May a court, in order to dismiss a petition for review, adopt findings of fact made by the Commission which are controverted by a petition for review, before the record of proceedings in the Commission is filed with the court?

(3) May a court ignore and fail to give credit to allegations of fact contained in a petition for review, when such allegations are legally admitted by motions to dismiss and when no record is available to the court?

(4) May the court, in order to dismiss a petition for review, make its own findings of fact—findings nowhere found in the opinion and order of the Commission and for which there is no support in any record before the court?

STATUTE INVOLVED

"Rehearing; Court Review of Orders

* * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of

Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)." (§ 19(b), Natural Gas Act, 15 U.S.C. § 717r(b), 52 Stat. 831).

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STATEMENT OF THE CASE

Introduction. This case arises out of an Order of the Federal Power Commission authorizing the construction and operation of a new natural gas pipe line to serve the States of Michigan and Wisconsin. Petitioner, Panhandle, has substantial interests already existing in Michigan, and sells large quantities of natural gas there. The new pipe line will deliver two-thirds of its gas to a distributing company which is already served by Panhandle and the remainder to another competitor of Panhandle in the same general area. The new pipe line will thus compete with Panhandle for the sale of natural gas.

On the basis of numerous substantial errors committed by the Commission, Panhandle petitioned for review of the above order pursuant to the provisions of Section 19(b) of the Natural Gas Act. This petition was dismissed by the court below on the ground that Panhandle was not aggrieved by the order. The decision is in conflict with applicable decisions of this Court as well as those of the courts of appeal in other circuits.

Panhandle is a person "aggrieved" by the order of the Commission within the meaning of Section 19(b) of the Natural Gas Act since its existing markets are threatened by the new service to the area. This threat is emphasized by the fact that the new competitor as well as its principal proposed purchaser, which is one of Panhandle's present important customers (but with which Panhandle no longer has an enforceable contract) are members of the same holding company system; and, there is not a sufficient market to absorb the additional gas which will be delivered as a result of the Commission's order.

Proceedings before the Commission.[1] American Louisiana

[1] After the petitioner had filed its petition for review in the Court of Appeals the Federal Power Commission moved for permission to defer the filing of a transcript of the record in that court. This motion was never formally acted upon but the record has not yet been filed. Accordingly, it is not possible to make record references to proceedings before the Commission.

Pipe Line Company, a newly organized subsidiary of the American Natural Gas holding company system, filed an application before the Federal Power Commission for authority to construct and operate a pipe line from the State of Louisiana to Detroit, Michigan. Texas Gas Transmission Corporation, a natural gas company, filed its application for authorization to sell to American Louisiana a portion of the gas it would require. Michigan Wisconsin Pipe Line Company, a wholly owned subsidiary of the American Natural Gas holding company system, filed its application for authority to construct facilities needed to receive deliveries of gas from its affiliate, American Louisiana. Michigan Consolidated Gas Company, another wholly owned subsidiary of the American Natural Gas holding company system, also filed its application for authority to construct facilities to receive deliveries of gas from its new affiliate.

American Louisiana proposed by means of this project to supply natural gas only to Michigan Wisconsin and Michigan Consolidated for resale to their respective customers in the States of Michigan and Wisconsin. The pipe line to be constructed to deliver gas only to American Louisiana's affiliates, would have an ultimate design capacity of 500,000 Mcf per day. It was proposed that initially American Louisiana would furnish 300,000 Mcf of gas per day—100,000 Mcf per day to Michigan Wisconsin and the remaining 200,000 Mcf per day to Michigan Consolidated.

The various proceedings were consolidated; and, Panhandle was allowed to intervene as a competitor pursuant to the provisions of Section 15(a) of the Natural Gas Act, 15 U.S.C. § 717n(a), 52 Stat. 829. After some hearings were held, the Commission entered two orders (App. 40, App. 43) finding that the record was inadequate insofar as it related to the ability of the applicants to perform the proposed service; the availability of the necessary supply of gas; the economic feasibility of the project; the marketability of the gas proposed to be

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delivered; and the adequacy of pipe line design and capacity. In short the Commission held that the record did not contain sufficient evidence upon which to base the issuance of a certificate of public convenience and necessity. Accordingly, the Commission ordered further hearings and also directed a recess until a designated date in order that American Louisiana's suppliers might submit to the Commission's jurisdiction as required by the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672.

Suddenly, capriciously, and before the end of the recess previously ordered, the Commission reversed its prior orders and required briefs to be filed and oral argument to be presented. Despite the fact that no order had been entered omitting the intermediate decision procedure which is required by the Administrative Procedure Act and the Commission's rules; despite the fact that its own staff vigorously opposed the granting of the certificate; despite the fact that the Commission itself had already said that the record would not support the issuance of a certificate of convenience and necessity, and despite the dissent of Chairman Kuykendall and Vice Chairman Digby, the Commission on October 1, 1954, issued its Opinion 276 and accompanying order granting certificates to American Louisiana and Texas Gas. (App. 16)

Panhandle in due course petitioned the Commission for rehearing. In this petition, as it had done in the petition for leave to intervene, Panhandle pointed out (App. 51-5) that it had "a substantial economic interest" in the proceeding; that it was a competitor of each of the applicants; that it "has very substantial interests in the area served by Michigan Consolidated and in other markets within reach of the proposed facilities"; and, that the effect of the granting of the certificates was to place the American Natural Gas holding company system (which pursues the policy of controlling the transmission of gas from the well head to the burner tip) in a position "to oust Panhandle from the market" and to pre-empt Panhandle's wholesale

sales market. The petition for rehearing was denied by the Commission, two of the five commissioners again dissenting.

Proceedings to Review the Commission's Order. In its petition to review and set aside the opinion and order of the Commission, Panhandle showed that (App. 3-4): It is a natural gas company which has been transporting natural gas through pipe lines extending into Detroit and other markets in the State of Michigan for many years. In the year ending June 30, 1953, Panhandle had sold 112,470,000 Mcf of gas in that State and in return received revenues aggregating $33,042,000. This represented 35% of Panhandle's entire sales. A substantial part of Panhandle's Michigan sales were made to Michigan Consolidated in the Detroit and Ann Arbor areas; and, such sales made up approximately 42 percent of Michigan Consolidated's gas supply. In addition, Panhandle sells to Texas Gas approximately 18,000 Mcf of gas per day.[2]

The petition alleges that Michigan Consolidated, American Louisiana and Michigan Wisconsin are all affiliated with the same holding company system. (App. 2) It is also alleged that Panhandle is aggrieved by the opinion and order which authorized construction and operation of a competing pipe line. (App. 6, 7)

The petition for review goes on to point out that the markets which Panhandle is authorized to continue to serve "include the Detroit area to which American Louisiana proposes to deliver two-thirds of its gas" (App. 4) and that Panhandle is a "competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas." (App. 3) The petition

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[2] Panhandle does not discuss in this petition for certiorari its status as an aggrieved party in regard to Texas Gas. Panhandle believes that it is aggrieved in this regard also, but simplification of the issues suggests that the discussion be limited to other matters noted above. See petition for rehearing in the court below. (App. 70-2)

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further alleges that there is no evidence of a sufficient market in the area involved to support the American Louisiana project. (Points 9 and 22, App. 9, 12)

In short, the petition for review shows that Panhandle is a competitor of all the parties participating in the new pipe line project; that it has substantial markets and customers which will be served by this new pipe line; that there is not a sufficient market to absorb the gas which the new supplier proposes to deliver; that all but one of the companies involved in the new project are affiliated in a holding company system; that Panhandle is entitled to continue to serve the market; and that Panhandle is aggrieved by the order introducing greater competition in its already existing market area.

In its answer to the several motions to dismiss filed by various intervenors and the respondent Commission, Panhandle elaborated somewhat on these allegations. It pointed out that it not only supplied Michigan Consolidated with 42 percent of its gas requirements, but also, it supplied other substantial natural gas customers in the same market area to the extent of 35 percent of its entire sales. (App. 48) Although no new "competitive application" was filed in the proceeding before the Commission, Panhandle is already "a competitor for the Detroit market." (App. 49) It was shown that in addition to the "resale" market to Michigan Consolidated, Panhandle and that company were in active competition for direct, industrial sales in the State of Michigan. (App. 49) No contract binds Michigan Consolidated to continue to purchase gas from Panhandle. Rather, Panhandle delivers 127,000 Mcf of gas per day because of a Commission imposed obligation to deliver up to that amount. (App. 49) As the matter presently stands, Panhandle is relegated to a temporary standby status, serving a subsidiary of the American Natural Gas system (Michigan Consolidated) while another subsidiary (American Louisiana) completes a new pipe line to the same market. (App. 50) Upon the

completion of the proposed construction "direct economic injury" is threatened because of probable loss of the existing market. (App. 50)

Notwithstanding a clear showing that Panhandle was aggrieved by the order, the court below took upon itself the task of negating the crucial allegation of competition. It found this allegation to be unwarranted because Panhandle was not competing with American Louisiana for the unsupplied market. (App. 60) To avoid the fact that Panhandle's *existing* market in Detroit was threatened, the court "found" that the new gas to be delivered there was not in displacement of any existing supplies, but to fill a "crying demand" for increased supplies for the area. (App. 59) This, of course, ignored completely Panhandle's allegations that there are no markets sufficient to absorb the new gas. Furthermore, although it was conceded at oral argument that Panhandle and Michigan Consolidated are competing for additional, unsupplied industrial sales, the court below omitted mentioning such sales and apparently took no notice of them.

Moreover, the court refused to believe that Michigan Consolidated will cut off Panhandle as a supplier.[3] On the

[3] No contract requires Panhandle to deliver gas to Michigan Consolidated. Rather, after a prior contract expired, the Commission ordered Panhandle to continue delivering the contract volumes (127,000 Mcf per day). Panhandle is now seeking to diminish this service to 87,500 Mcf per day. See, *Michigan Consolidated Gas Co.* v. *F.P.C.*, 203 F. 2d 895; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 204 F. 2d 675; and *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 204 F. 2d 925. The court below alludes to these cases as showing that Panhandle is not injured because it seeks to reduce the quantity of gas sold to Michigan Consolidated. However, this is beside the point. Panhandle has never sought to abandon all service to Michigan Consolidated and still proposes to deliver 87,500 Mcf a day. Also, there is no showing that Panhandle intends to decrease the gas it sends to the Detroit area; and, in any event, loss of a market for 87,500 Mcf of gas a day is substantial enough. Whether such loss amounts to 127,000 or 87,500 Mcf has nothing to do with the case. Moreover, Panhandle has continually offered to negotiate with Michigan Consolidated in order to supply additional gas, if any be needed in this area.

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contrary, it found that Michigan Consolidated could not refuse delivery without authority from the Federal Power Commission. Consequently, it felt that Panhandle's allegations of injury were speculative. (App. 59) However, on the very day the case was being argued before the court, the Commission released the news of an order providing that "Michigan Consolidated Gas Company is exempt from the provisions of the Natural Gas Act, and the orders, rules and regulations of this Commission issued pursuant thereto." (App. 73) This fact was brought to the attention of the court below by a petition for rehearing (App. 63) which was denied. (App. 74). It hardly needs to be said that without a contract and deprived of Commission protection of its sales to Michigan Consolidated, Panhandle is at the mercy of its competitors who are members of the same holding company system.

ARGUMENT

Question No. 1. It is now firmly established that the class of persons who are aggrieved for purposes of an aggrieved party statute such as Section 19(b) of the Natural Gas Act, includes a competitor threatened with economic injury as a result of an agency order which results in increased competition. And, this is true notwithstanding the lack of any substantive right to be free from such increased competition. The leading case under the Natural Gas Act amply demonstrates that a competitor threatened with loss of its *existing* market is "aggrieved" when the Federal Power Commission sanctions the intrusion of additional competition into that market. *National Coal Ass'n.* v. *Federal Power Commission*, D.C. Cir., 191 F. 2d 462. In that case the Commission granted a certificate of necessity to a natural-gas company authorizing it to begin serving the Atomic Energy Commission's plants at Oak Ridge, Tennessee. Coal producers, mine owners and operators, some of whom were said to be selling to Oak Ridge were held to be aggrieved parties.

Likewise, a labor union some of whose members were allegedly employed in mines selling to Oak Ridge, and, a union some of whose members were allegedly engaged in transporting coal to Oak Ridge were held to be aggrieved parties. As persons already serving Oak Ridge and therefore subjected to natural gas competition for this market by the Commission order, they belonged to the class of persons whose injury was sufficiently direct and immediate to qualify them as aggrieved and entitled to review of that order. The court said:

> "It is unnecessary for us to undertake a re-examination at this time of what has already been done so well by Judge Frank in his comprehensive discussion of the considerable body of case law which has developed with regard to the problem of standing to challenge administrative orders. See Associated Industries v. Ickes, 2 Cir., 1943, 134 F. 2d 694. We agree with the rationale which that case draws from the Supreme Court's decisions in the Sanders and Scripps-Howard cases: '* * * one threatened with financial loss through increased competition resulting from a Commission's order is "aggrieved," and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition.' The '"person aggrieved" review provision [is] a constitutionally valid statute authorizing a class of "persons aggrieved" to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Although one threatened with financial loss through increased competition * * * cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the "person aggrieved" statute gives the needed authority to do so to one who comes within that description.'
>
> "The doctrine that a competitor belongs to the class of persons whose injury is sufficiently direct and

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> immediate to qualify as 'aggrieved' has been applied in a case brought under § 19(b) of the Natural Gas Act. In Cia Mexicana De Gas v. Federal Power Commission, 5 Cir., 1948, 167 F. 2d 804, 805-806, the court thought it 'clear' that *a natural gas company which competed with a certificate applicant was entitled to seek judicial review of the order granting the certificate.*" (Emphasis supplied.) (191 F. 2d at 464-5)

Cia Mexicana De Gas v. *Federal Power Commission*, 5 Cir., 167 F. 2d 804, 805-6, cited by the court in the *National Coal* case is likewise directly in point. Cia Mexicana was a public utility serving the territory sought to be invaded by Reynosa to whom the Federal Power Commission had granted a certificate for the exportation of natural gas. Reynosa moved to dismiss the petition for review and the court said:

> " . . . We think it clear that petitioners are aggrieved parties within the meaning of the Act, and as such, are rightfully here."

In another case arising under the Natural Gas Act, *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 5 Cir., 113 F. 2d 281, the court held that Arkansas Louisiana was aggrieved by the granting of a certificate of necessity to construct a gas pipe line into a territory already served by it.

Up to the time the present case was decided the courts had held in every instance in which the question has been raised under the Natural Gas Act that a party presently selling in the market to be invaded by a new pipe line company is an aggrieved party entitled to obtain court review of the order granting the certificate of necessity. The decision of the court below is accordingly in conflict with these decisions and should be reviewed by this Court.

Under other aggrieved party statutes similar to the Natural Gas Act the results have been uniformly the same. The interests of a person serving the market at the time

a competitor is authorized by agency action to begin serving that market are sufficient to confer standing to obtain review. The leading case is *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 476-7, in which this Court resolved the confusion which had arisen concerning the status of competitors as aggrieved parties. In that case the Court stated:

> "It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application.
>
> "Section 402(b) of the Act, 47 USCA § 402(b), provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) 'by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.'
>
> "The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission it is impossible that § 402(b) was intended to give the respondent standing to appeal, since absence of right implies absence of remedy. This view would deprive subsection (2) of any substantial effect.
>
> "*Congress had some purpose in enacting § 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.* It is within the power of Congress to confer such standing to prosecute an appeal.
>
> "We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission." (Emphasis supplied.)

The Court has since reaffirmed its position as to the standing of competitive interests to obtain review in *Scripps-*

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Howard Radio Co., Inc. v. *Federal Communications Commission*, 316 U.S. 4.

In *Evans* v. *Federal Communications Commission*, D.C. Cir., 113 F. 2d 166, 168, the court had before it an appeal from an order granting a license to construct and operate a radio station in the same area in which the appellant already had a station. Sustaining the appellant's standing, the court said:

> ". . . The appeal is upon the ground, among others, that appellant will be a competitor of the new station if it is erected and operated . . . As we understand the decision in the Sanders case, even though the licensee of an *existing station* 'cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him,' nevertheless he is a 'person aggrieved or whose interests are adversely affected' within Section 402(b) for the purpose of maintaining an appeal . . ." (Emphasis supplied.)

In contrast with these and the Natural Gas Act cases, the court below erroneously states (App. 58):

> ". . . *Whether or not it* [*Panhandle*] *is a competitor* of these companies [the applicants] for the present restricted market in the states of Michigan and Wisconsin *is beside the point.*" (Emphasis supplied.)

Although the Sanders case and all the others cited above were fully briefed and argued before the court below, it did not even cite them.[4]

While all of the above cases were not decided under the Natural Gas Act, there can be no question regarding their

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[4] The *National Coal* case was cited in a string of cases dealing with the proposition that a bare allegation by a petitioner that it is "aggrieved" will not suffice to sustain a petition for review otherwise barren of facts supporting aggrievement. But this was not the basis of the court's decision, the rule being inapplicable in this case since Panhandle did not stop at simply alleging aggrievement. Such an allegation with supporting facts should not, however, be ignored. It constitutes a shorthand method of saying that as a result of certain facts, the petitioner will be injured.

applicability to this case. The decision of the court below squarely conflicts with them and should be reversed summarily, since it is diametrically opposed to a unanimous line of authority, including cases decided by this Court.

In *Chapman* v. *Federal Power Commission,* 345 U.S. 153, this Court approved the addition of consumers to the categories of persons entitled to obtain review under the Federal Power Act. Other consumer cases are of significance in measuring the extent to which review of administrative proceedings is obtainable under aggrieved party statutes. *Associated Industries* v. *Ickes,* 2 Cir., 134 F. 2d 694, involved a petition for review on order of the Bituminous Coal Division of the Department of Interior. The Bituminous Coal Act authorized jurisdictional review at the instance of "any persons aggrieved." Recognizing that competitors of persons in whose favor administrative orders were made had long been accorded the right as parties aggrieved to obtain review of such orders, the court held that a consumer threatened with loss by reason of increased prices belonged in that class notwithstanding such consumer lacked a "private substantive legally protected interest."

Similarly, in *Reed* v. *Ewing,* 2 Cir., 205 F. 2d 630, a dealer in fish oils which were used as a vitamin supply in manufacturing oleomargarine was considered aggrieved by a Federal Security Administration order allowing the use of synthetic vitamins in oleomargarine.

If the decision of the court below stands, only a competitor applying for authorization to expand its markets could qualify as an aggrieved party entitled to review of an adverse decision regarding its application. This is patently erroneous. In each of the cases cited above the party held entitled to review was seeking to protect its existing market rather than competing for increased or unsupplied markets. They were existing suppliers of a market into which new competition was coming as a result of an agency order. The presence or absence of additional

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market requirements was nowhere suggested as being material. The decision below radically changes the existing law regarding aggrieved party status. An unsupplied market has no significance to the person striving to protect his already supplied market from damage by competition.

No doubt competition for an unsupplied market would confer standing upon a person interested in serving that market. In fact, as has already been pointed out, Panhandle is competing strongly with other suppliers in the involved area for sales to industrial consumers. Such sales are beyond the purview of Federal jurisdiction and a competing application regarding them would serve no purpose whatsoever.

As brought out in oral argument below, there is presently pending before the Michigan Public Service Commission an application by Panhandle for authority to sell gas to McLouth Steel. Michigan Consolidated has sought this customer, but, under orders of the State Commission, it has not been permitted to sell gas on an interruptible basis to large new industrial customers. Nevertheless Michigan Consolidated is vigorously opposing Panhandle's application to begin this service and is relying strongly on increased supplies from American Louisiana to insure its ability to serve the plant. (App. 69)

Obviously, even under the theory adopted by the court below, Panhandle is aggrieved. Yet, no mention was made of the competition between Panhandle and Michigan Consolidated for unsupplied industrial markets.

Question No. 2. In the last analysis the decision of the court below rests entirely upon the assumption that there is a "crying demand" for gas in the market presently being served by Panhandle and that because Panhandle has not filed an application to render that service it will not be aggrieved by a grant of authority to some other person to render that service. This conclusion rests upon a further assumption, namely, that the new gas will not displace

existing supplies. Both assumptions fly in the face of the allegations which Panhandle has made to sustain its aggrieved status.

A threat is posed to Panhandle's existing market for more than one reason. In the first place it does not believe there are sufficient new markets in the area to allow room for both American Louisiana and Panhandle. Panhandle attacked the Commission finding to the contrary and points to prior orders of the Commission (App. 40, 43) which indicate that there may not be sufficient evidence of such markets. Certainly until a court is able, on the record, to uphold the Commission's finding that such markets exist, that court may not blindly assume that they do exist and hold therefore that the existing seller is not aggrieved. American Louisiana's ultimate pipe line design capacity will be 500,000 Mcf per day. That's a lot of gas—and delivery of this potential would more than double the amount of gas presently available to the area.[5] The initial deliveries authorized by the Commission are approximately equal to Panhandle's yearly sales in the area.

The court below gratuitously assumed that there was a sufficient unsupplied market to support the American Louisiana project and that therefore the new gas would not displace that which Panhandle sells in the area. From this assumption the court was able to conclude that Panhandle was not really a competitor and, therefore, not aggrieved because no application to serve the unsupplied market had been filed by Panhandle. But this is obviously an impossible approach. To authorize increased service to a market area the Federal Power Commission must find that there is a necessity for the increase. This includes a finding that a market exists for the new gas. Section 7(c), Natural Gas Act, 15 U.S.C. § 717f(c), 56 Stat. 84. If the court simply rubber stamps the Commission's finding in

[5] The Commission found that the present supply of gas from all sources aggregates 156,950,000 Mcf annually. American Louisiana's design capacity would allow it to deliver 182,500,000 Mcf annually.

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this regard, though the finding is under attack in the petition for review, the result is obvious. There could never be a review in a case in which new pipe lines are authorized to serve a market already being served by an existing supplier. The only alternative is to require an existing seller to apply to the Commission for authority to serve an unsupplied market which it does not believe to exist and does not wish to serve; and, it must do this solely to protect its existing market.

The Commission made the same mistake as the court below. Because it had found that there was need for the gas, and because Panhandle had not made a proposal to serve this so-called "crying demand", the Commission said:

> "Panhandle Eastern Pipe Line Company, which company also serves Michigan Consolidated, has intervened in opposition to the granting of the application, alleging competition. We do not find, however, any proposal by Panhandle to meet additional needs of Michigan Consolidated or of the other customers of Michigan Wisconsin. Accordingly, we do not see wherein Panhandle may be aggrieved by the granting of a certificate to American Louisiana." (App. 30)

Thus, the Commission also ignores the fact that the existence of such a "crying demand" is disputed by Panhandle.

Without the assumption that there are sufficient additional markets requiring the American Louisiana gas, this statement of the Commission is utterly meaningless. Moreover, such a statement could not have been intended as a finding concerning Panhandle's standing to obtain review in court. To make a party's aggrieved status subject to Commission finding or statements would render the review provisions of the Natural Gas Act a nullity at the whim of the Commission.

It is submitted that the decision of the court below is of tremendous significance to the administration of the review provisions of not only the Natural Gas Act, but similar

statutes also. To allow a court to frustrate review of Commission action by the simple expedient of agreeing with what it did on the merits prior to any consideration of the record is to sanction a departure from the very purpose for which Congress passed aggrieved party statutes. *Sanders* case, *supra*. It makes the Commission responsible to no one whereas Congress had just the opposite intention in broadening the right to obtain review.

One of the main functions of the courts in reviewing administrative action is to determine whether findings of fact made in connection therewith are supported by substantial evidence. This function is certainly short circuited when courts blandly state that a finding under attack "can hardly be disputed", especially when there is no record before the court. To allow the court below to avoid reviewing this agency action by a beforehand agreement with the agency action is to sanction a refusal to perform a duty imposed by law.

Question No. 3. The court below agreed with the Commission and said: "There exists in that area 'a crying demand' for additional quantities of gas. This can hardly be disputed." (App. 58) It does not say that the petition for review is technically insufficient for failure to make the proper allegations. It does not even dispute the allegation that Panhandle is a competitor of the new pipe line with interests in a substantial existing market. All of this is unimportant—"beside the point" says the court—because the area needs the amount of gas American Louisiana will furnish. But, the petition for review expressly disputes the Commission finding on the existence of markets sufficient to absorb the new gas. How is the court to dispute this allegation when it does not even have the record of the evidence as to markets before it? It is submitted that a departure such as this from the accepted method of judicial procedure should not be countenanced by this Court.

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In ignoring Panhandle's allegation that there was no sufficient market to absorb the gas which American Louisiana will deliver, the court acted contrary to the practice noted in every other case of this type. Panhandle expressly challenged "the availability of sufficient markets to absorb the volumes of gas contemplated by the certificate." (Points 9, 22, App. 9, 12) Motions to dismiss filed by various parties necessarily admitted this allegation.

It is fundamental that the factual allegations made by a party petitioning for review are admitted by motions to dismiss. *Aluminum Co. of America* v. *Federal Power Commission*, D.C. Cir., 130 F. 2d 445, 446; *National Coal Association* v. *Federal Power Commission*, D.C. Cir., 191 F. 2d 462, 466; *Associated Industries* v. *Ickes*, 2 Cir., 134 F. 2d 694, 699. The principle is well stated in *Philadelphia Co.* v. *Securities and Exchange Commission*, D.C. Cir., 164 F. 2d 889, 890, as follows:

> ". . . The relevant facts are either alleged in the petition for review and admitted, for the purpose thereof, by the motion to dismiss . . . or as stated in the brief of Philadelphia and treated as true, or not denied, in the brief of the Commission."

See, also, *Pollack* v. *Public Utilities Commission*, D.C. Cir., 191 F. 2d 450, 454, reversed on other grounds, 343 U.S. 451; Cf., *Saxton Coal Mining Co.* v. *National Bituminous Coal Commission*, D.C. Cir., 96 F. 2d 517, 518.

Perhaps the fullest description of the function of a court of appeals in determining whether a petitioner for review of agency action is "aggrieved" is contained in *Yankee Network* v. *Federal Communications Commission*, D.C. Cir., 107 F. 2d 212, 224. The court said:

> ". . . The Supreme Court has held that the jurisdiction of a district court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that

> jurisdiction whether well founded or not.' Similarly, our jurisdiction on appeal under the Communications Act depends upon whether reasons of appeal are assigned, which, if well founded, would show that the appellant is a person aggrieved or whose interests are adversely affected by the decision of the Commission from which the appeal is taken. *If, however, upon an examination of the record we find that the appellant is not a person aggrieved or adversely affected by the order of the Commission, it then becomes our duty to dismiss the appeal.*" (Emphasis supplied.)

The court below certainly did not follow the procedure specified in these cases, all of which involve direct review of agency action by a court of appeals. Certainly, with no record before it, the court below was in no position to follow such procedure. Whether its action in this regard be described as creating a conflict of decision or a departure from accepted judicial standards, the impropriety of such action is clearly worthy of the attention of this Court.

Question No. 4. A part of the rationale followed by the court below in dismissing Panhandle's petition for review was that Michigan Consolidated could not and would not refuse to take gas from Panhandle after the American Louisiana gas becomes available. Therefore, concluded the court, Panhandle's allegation of injury is "speculative." This amounts to a finding for which there is no justification whatever.

It has been pointed out that Michigan Consolidated is no longer subject to the jurisdiction of the Federal Power Commission. Furthermore, no contract requires it to take Panhandle's gas. How is it that Michigan Consolidated is still required to take this gas? Without a contract, and with no bargaining position as a result of Commission approval of the American Louisiana project, and sans Federal Power Commission protection of the sale to Michigan Consolidated, Panhandle is at a loss to understand why such sale could not be terminated.

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Whether Michigan Consolidated actually will immediately cease to take Panhandle gas or not is not material. The threat is present and existing. There is not a sufficient market to sustain both American Louisiana and Panhandle. American Louisiana and Michigan Consolidated are affiliates, members of the same holding company system. Michigan Consolidated will have two large, 100 percent affiliated pipe line suppliers. With idle capacity in one or both of those sister companies, with no contract binding Michigan Consolidated, and with the Federal Power Commission powerless to enforce any orders upon Michigan Consolidated, Panhandle's prospects are altogether clear. Whether this loss of markets amounts to the 127,000 Mcf per day presently being delivered or the 87,500 Mcf per day which would be delivered if Panhandle was allowed to abandon a part of its service is immaterial.

Relations between Panhandle and the American Natural Gas holding company system have been bitter for many years. Ever since American Natural attempted to take over Panhandle and, failing in that, to drive Panhandle out of the direct and resale market in the Detroit area, there has been continual discord. In addition to this case, and the four cases cited in the opinion below, these parties have been involved in at least ten other court actions arising out of the struggle for the Detroit market.[6] In light

[6] (1) *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, (C.A. 3, 1955) No. 11,510, filed January 6, 1955.

(2) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, (C.A. 6, 1955) No. 12,200, argued February 4, 1955; appeal from 117 F. Supp. 551 (E.D. Mich., 1953).

(3) *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, (C.A. 6) No. 12,201, argued February 4, 1955; appeal from 117 F. Supp. 551 (E.D. Mich., 1953).

(4) *Michigan Consolidated Gas Co.* v. *Michigan Public Service Commission*, (Circuit Court, Ingham County) No. 36,297, filed January, 1955.

(5) *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951).

of this history, Panhandle submits that Michigan Consolidated will cut off its purchases, totally or partially, just as soon as American Louisiana can be placed in operation.

The decision of the court below is without legal justification. There is absolutely no basis whatsoever for the assumption that Panhandle would not lose its market or that its loss is speculative. On the contrary, any realistic view of the situation shows at the minimum a real threat of loss.

CONCLUSION

As is evident from the argument, the questions presented are interdependent. In the end, however, it is clear that as a long-standing supplier of an existing market invaded by a competitor, petitioner is aggrieved and that the decision of the court below conflicts with decisions of this Court and those of other circuit courts of appeal. Moreover, the decision of the court below is in conflict with applicable decisions of other circuits and contrary to accepted judicial procedure in that the court accorded no weight to allegations of fact made in the petition for review, although there was no record before the court, accepted findings of the Commission which were attacked in the petition for review, and made findings for which there is no support in fact or law.

---

(6) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Company*, 173 F. 2d 784 (C.A. 6, 1949).

(7) *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F. 2d 942 (C.A. 6, 1949).

(8) *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (C.A. D.C., 1948).

(9) *Panhandle Eastern Pipe Line Co.* v. *Securities & Exchange Commission*, 170 F. 2d 453 (C.A. 8, 1948).

(10) *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 167 F. 2d 264 (C.A. D.C. 1948).

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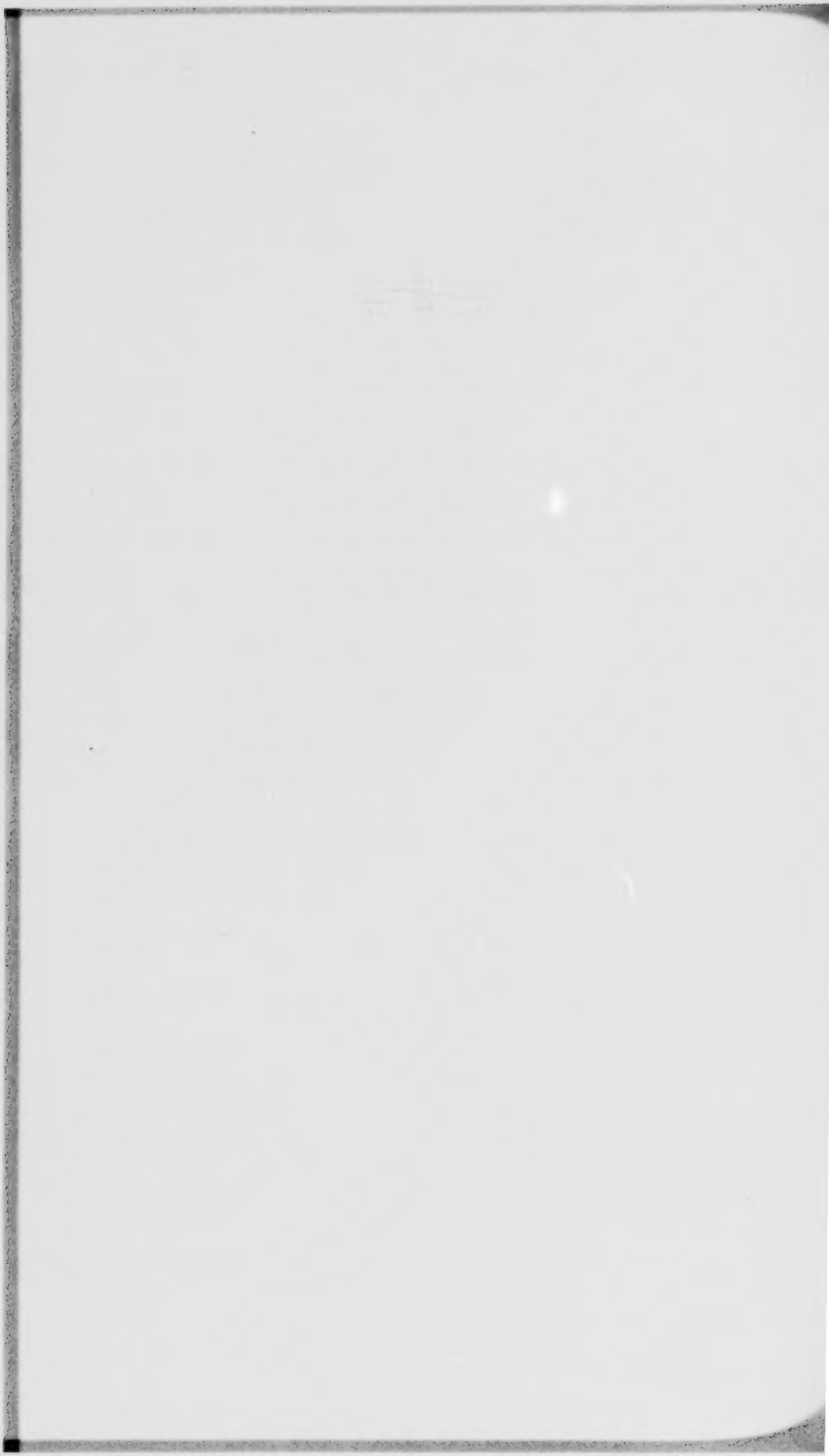
WHEREFORE, this petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment.

Respectfully submitted,

WILLIAM E. MILLER
1100 Shoreham Building
Washington 5, D. C.
Counsel for Petitioner

Of Counsel

STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.



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Supreme Court
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation,
Petitioner

v.

FEDERAL POWER COMMISSION, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

WILLIAM E. MILLER
1100 Shoreham Building
Washington 5, D. C.
Counsel for Petitioner

Of Counsel:
STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

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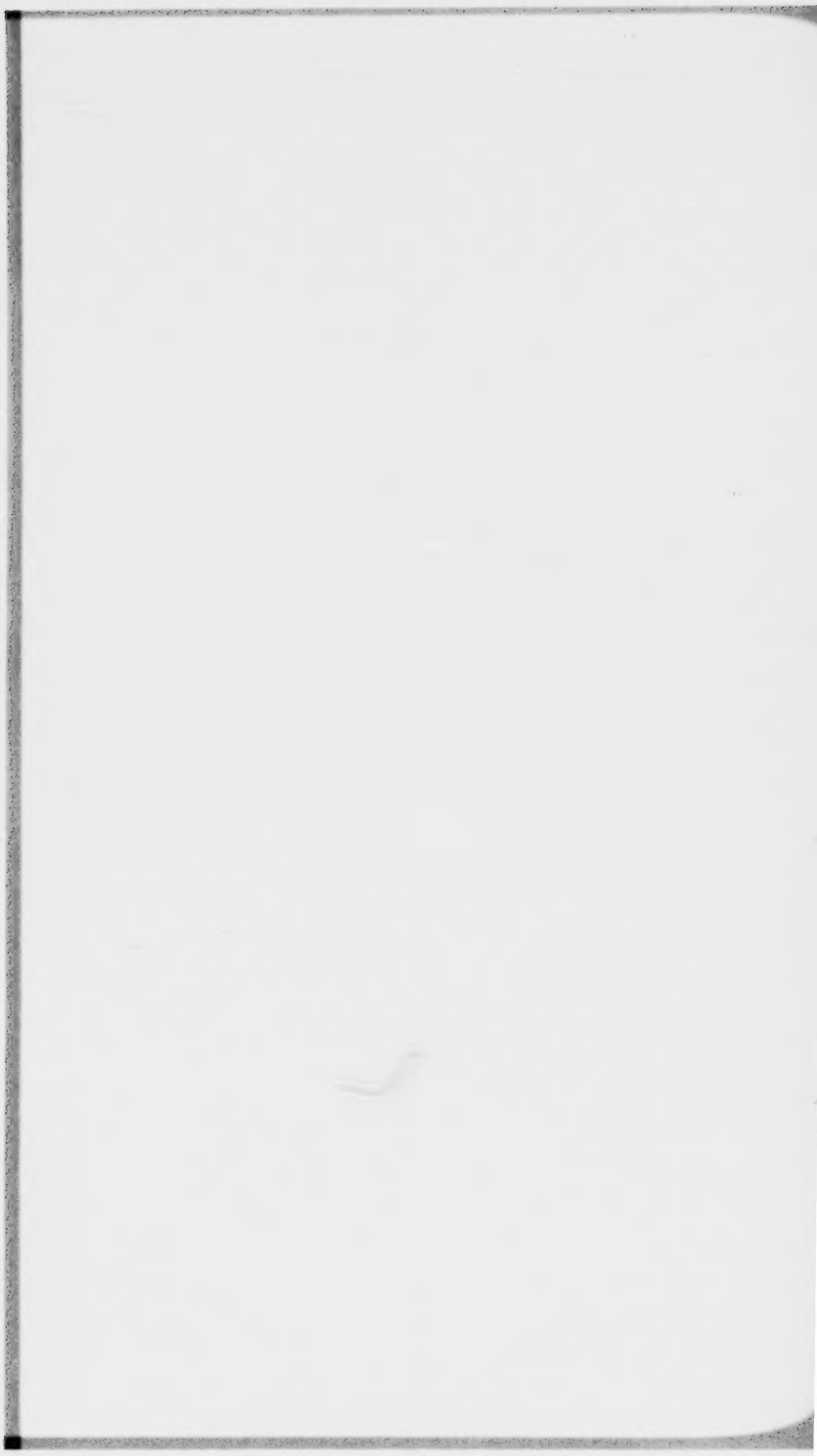

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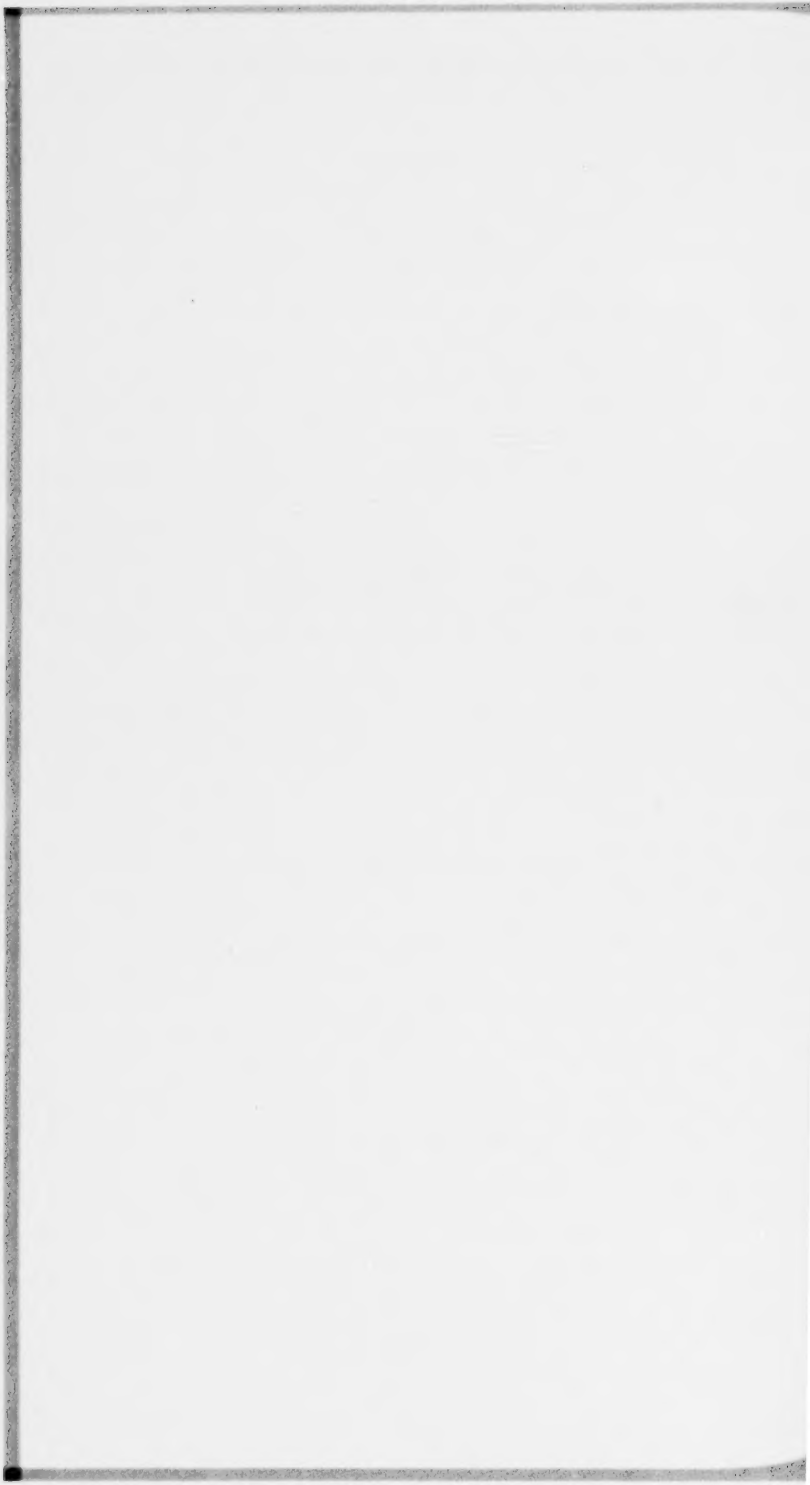

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APPENDIX

PETITION TO REVIEW AND SET ASIDE OPINION AND ORDER OF THE FEDERAL POWER COMMISSION AND FOR STAY

To the United States Court of Appeals for the Third Circuit and the Honorable Judges Thereof:

Panhandle Eastern Pipe Line Company[1] petitions this Honorable Court to review and set aside Opinion 276 and

[1] Hereinafter sometimes called "Panhandle" or "petitioner".

accompanying order, issued October 1, 1954, by the Federal Power Commission in Docket Nos. G-2306 et al., entitled "In the Matters of American Louisiana Pipe Line Company; Texas Gas Transmission Corporation; Michigan Wisconsin Pipe Line Company; Michigan Consolidated Gas Company." The opinion and order complained of herein are printed in the Appendix hereto.

NATURE OF ADMINISTRATIVE PROCEEDINGS SOUGHT TO BE REVIEWED

On November 10, 1953, American Louisiana Pipe Line Company, a newly organized subsidiary of the American Natural Gas holding company system, filed an application before the Commission in Docket No. G-2306 for a certificate of public convenience and necessity authorizing the construction and operation of a proposed natural gas pipeline extending from Krotz Springs, Louisiana, through the States of Arkansas, Mississippi, Tennessee, Kentucky, Illinois and Indiana, and terminating at Detroit, Michigan. Also, on November 10, 1953, Texas Gas Transmission Corporation, an interstate pipeline company, filed its application in Docket No. G-2311 for a certificate of public convenience and necessity authorizing it to sell gas to American Louisiana at a point near Slaughters, Kentucky, and to construct facilities needed for such sale.

On December 9, 1953, Michigan Wisconsin Pipe Line Company, a wholly-owned subsidiary of the American Natural Gas holding company system, filed its application in Docket No. G-2327 for a certificate of public convenience and necessity authorizing it to construct facilities needed to receive deliveries of gas from its affiliate, American Louisiana. Also, on December 9, 1953, Michigan Consolidated Gas Company, a wholly-owned subsidiary of the American Natural Gas holding company system, filed its application in Docket No. G-2328 for a certificate of public convenience and necessity authorizing it to construct facilities to receive deliveries of gas from its affiliate, American Louisiana. Michigan Consolidated also requested a cer-

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tificate authorizing it to construct facilities in, and to operate, its Six Lakes storage field, needed in order to enable it to receive large volume deliveries from American Louisiana.

Applications were not filed by any of the producers upon whom American Louisiana relied for its gas supply, although the United States Court of Appeals for the District of Columbia Circuit had determined on May 22, 1953, that such sales were subject to the provisions of the Natural Gas Act. *State of Wisconsin et al.* v. *Federal Power Commission*, 205 F. 2d 705 (C.A. D.C.)

American Louisiana proposed by means of this project to supply natural gas only to its two affiliates, Michigan Wisconsin and Michigan Consolidated, for resale to their respective customers in the States of Michigan and Wisconsin. American Louisiana proposed to furnish about 100,000 Mcf per day to Michigan Wisconsin and about 200,000 Mcf per day to Michigan Consolidated. At the present time Michigan Consolidated receives about 58% of its supply of natural gas from Michigan Wisconsin, and the balance from Panhandle, the petitioner herein. The total estimated cost of the American Louisiana facilities exceeds $130,000,000, and the cost of the facilities proposed to be constructed by its affiliates exceeds $24,000,000.

Panhandle, the petitioner herein, is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas within the purview of Section 15(a) of the Natural Gas Act. Panhandle produces and purchases large quantities of natural gas in Texas, Oklahoma and Kansas, and owns and operates a main transmission pipeline system extending through the States of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio to Detroit, Michigan, enabling it to supply its markets with approximately 970,000 Mcf of gas on days of maximum demand. Large volumes of gas are transported through petitioner's pipelines and sold by petitioner to Michigan Consolidated for resale to consumers in the Cities of Detroit and Ann Arbor and their environs in Michigan. Peti-

tioner's sales in the State of Michigan in 1953 amounted to about 35% of petitioner's entire sales. For the year ended June 30, 1953, petitioner sold 112,470,000 Mcf of gas in the State of Michigan from which it received revenue amounting to $33,042,000. In addition, Panhandle sells to Texas Gas approximately 18,000 Mcf of gas per day.

The operations in which Panhandle has been engaged, on and continuously since February 7, 1942 (the effective date of amendatory Section 7(c) of the Natural Gas Act), are carried on pursuant to the authorization of "grandfather" and "non-grandfather" certificates issued by the Commission. The markets which Panhandle is authorized to continue to serve include the Detroit area to which American Louisiana proposes to deliver two-thirds of its gas.

In its order of February 8, 1954, the Commission found that the application of American Louisiana and those of the other three applicants were "interdependent" and consolidated the four proceedings. On the same day, the Commission granted petitioner's petition to intervene in each of the proceedings.

On March 8, 1954 hearings were commenced with respect to the adequacy of the gas supplies of American Louisiana and Texas Gas. Evidence as to this issue was presented by applicants and by petitioner. On May 13, 1954, the Commission entered an order omitting the intermediate decision procedure and directing the Presiding Examiner to certify the record for determination of the gas supply issue. Briefs were filed by the interested parties and oral argument was heard by the Commission on May 24, 1954. On June 8, 1954, the Commission issued an order in which it stated that it would be "inappropriate" to make a determination concerning the adequacy of the gas supplies.

The hearings were reconvened on June 23, 1954. The United States Supreme Court having affirmed, on June 7, 1954, the holding of the Court of Appeals that producers selling gas in interstate commerce are "natural-gas companies," subject to the provisions of the Natural Gas Act,

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on August 2, 1954, the Commission entered an order stating that it would be necessary to consider the "interdependent" applications, none of which had been filed, of the producers at the same time it considered the evidence submitted by American Louisiana and the other applicants herein.[2] The Commission further stated that it would be necessary to consider at the same time, the evidence to be submitted by the intervenors, none of which had been presented.

On August 13, 1954, the Commission issued an order denying the motions of the applicants to sever the applications of American Louisiana and Texas Gas from the other pending applications.[3] The Commission also denied the applicants' motions for omission of the intermediate decision procedure and for immediate determination of the merits of the American Louisiana and Texas Gas applications.

The Commission also ordered that the hearings be recessed from August 6 until September 13, 1954, at which time applicants were to introduce further evidence of gas supply, intervenors were to present their evidence, and the producers were to file their applications.

In its orders of August 2 and August 13, requiring further evidence to be presented, the Commission stated:

> "Congress has required findings based upon the evidence adduced of record that the 'applicant is *able* and willing properly to do the acts and to perform the services proposed . . ., otherwise such applications shall be denied.' (Emphasis supplied). Prerequisites to a finding that an applicant is 'able' to do the acts and perform the (sic) services proposed are *inter alia*, subsidiary findings relating to gas supply, economic feasibility, marketability and adequacy of design and capacity. Where the record is deficient with respect to

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[2] The Commission's order of August 2, 1954, is printed at page 26 of the Appendix hereto.

[3] The Commission's order of August 13, 1954 is printed at page 30 of the Appendix hereto.

any of such findings there is no basis upon which the finding required by the Act can rest."

Then, sometime after 4 P.M. on September 3, the Friday of Labor Day weekend, during the period of the Commission's general summer recess, the Commission issued an order in effect reversing its orders of August 2 and August 13, and requiring the filing of briefs and the presentation of oral argument before the Commission at 9:30 A.M. on the following Wednesday, thus allowing only one working day for the preparation of briefs and argument. Petitioner and other parties immediately filed their telegraphic protests with the Commission.

Despite the fact that no order had been entered omitting the intermediate decision procedure as required by the Administrative Procedure Act; despite the fact that its own staff vigorously opposed the granting of the certificate; and despite the dissent of Chairman Kuykendall and Commissioner Digby,[4] the Commission on October 1, 1954 issued its Opinion 276 and accompanying order purporting to grant certificates to American Louisiana and Texas Gas.

Being aggrieved by such order and opinion, Panhandle filed with the Commission on October 15, 1954, its application for rehearing and stay of said opinion and order. This application along with those of other parties was denied without further opinion by the Commission in its order of November 15, 1954, Chairman Kuykendall and Commissioner Digby dissenting.

JURISDICTION AND VENUE

The statute upon which venue and jurisdiction in this case are based is Section 19(b) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 831; 15 U. S. C. 717r(b)), the pertinent part of which is as follows:

"Any party to a proceeding under this act aggrieved by an order issued by the Commission in such pro-

[4] The dissenting opinion of Chairman Kuykendall and Commissioner Digby is printed at page 20 of the Appendix hereto.

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ceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * "

The facts upon which jurisdiction is based may be briefly stated. Both American Louisiana and Texas Gas are corporations organized and existing under and by virtue of the laws of the State of Delaware and, thus, are located in the Third Circuit within the meaning of Section 19(b) of the Natural Gas Act. Petitioner was a party to the proceedings before the Commission wherein the Commission entered the opinion and order hereinabove referred to and is aggrieved by each of them. Within thirty days after the date of the opinion and order, petitioner, pursuant to Section 19(a) of the Natural Gas Act, filed with the Commission an appropriate application for rehearing. Panhandle's application for rehearing and stay of Opinion 276 and the accompanying order were denied by the Commission's order of November 15, 1954. This petition for review, therefore, is filed within the sixty day period contemplated by Section 19(b) of the Natural Gas Act.

POINTS ON WHICH PETITIONER INTENDS TO RELY

The points on which petitioner intends to rely upon review of the Commission's Opinion 276 and accompanying order of October 1, 1954, each of which points was urged in petitioner's application for rehearing before the Commission, are as follows:

1. The Commission erred in entering its Opinion 276 and accompanying order of October 1, 1954, over the objections of its staff and despite the dissent of Chairman Kuykendall and Commissioner Digby, in the absence of

substantial evidence and without the basic or subsidiary findings necessary to support the conclusions reached and the action taken by it.

2. The Commission erred in granting certificates to American Louisiana and Texas Gas on the basis of its ultimate conclusion that such applicants are able and willing to do the acts and perform the services authorized, in the absence of substantial evidence and subsidiary findings.

3. The Commission erred in precipitately reversing without explanation its two prior orders herein which would have required the applicants to present further evidence in order to sustain their burden of proof with respect to gas supply, economic feasibility, including financing, marketability and adequacy of design and capacity, prior to the issuance of any certificate.

4. The Commission erred in attempting to substitute conditions for the findings required under the National Gas Act to support the issuance of certificates of public convenience and necesstiy.

5. The Commission erred in granting a certificate to American Louisiana in the absence of any lawful gas supply, and by attempting to substitute Paragraph B(i) of its order, conditioning the certificate upon subsequent proof of gas supply, for the substantial evidence which should have been required.

6. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence as to adequacy of design, and by attempting to substitute Paragraph B(ii) of its order, conditioning the certificate upon subsequent proof as to design, for the necessary finding.

7. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence as to fair and reasonable rates, and by attempting to sub-

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stitute Paragraph B(iv) of its order, conditioning the certificate upon subsequent filing of acceptable rates, for the necessary finding.

8. The Commission erred in granting a certificate to American Louisiana, recognizing that the proposed project cannot presently be financed, and by attempting to substitute Paragraph B(v) of its order, conditioning the certificate upon subsequent development of a feasible plan of financing, for the necessary finding.

9. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence that American Louisiana's affiliates have an adequate market for the gas, and by attempting to substitute Paragraph D of its order, reserving for future determination the question of markets, for the necessary finding.

10. The Commission erred in granting a certificate to Texas Gas in the absence of substantial evidence as to fair and reasonable rates, and by attempting to substitute Paragraph C(iv), conditioning the certificate upon subsequent filing of acceptable rates, for the necessary finding.

11. The Commission erred in severing the American Louisiana and Texas Gas applications from those of Michigan Wisconsin and Michigan Consolidated. There is no substantial evidence in the record to support the Commission's Finding No. 7 and the certificates based upon such finding are invalid. The applications could not lawfully be considered separately since they are "interdependent" as the Commission itself found in its two prior orders.

12. The Commission erred in issuing a certificate to American Louisiana contemplating the construction of a pipeline with a capacity of 300,000 Mcf per day, while at the same time in Paragraph B(ii) of its order reserving for future determination whether public convenience and necessity require the construction of the portion of the proposed facilities through which one-third of the gas is proposed to be delivered.

13. The Commission erred in issuing a certificate to American Louisiana contemplating the construction of a pipeline with a capacity of 300,000 Mcf per day without making any finding whatever concerning the feasibility of the proposed Six Lakes storage field, without which American Louisiana concededly could not deliver 200,000 Mcf per day to Michigan Consolidated.

14. The Commission erred in granting a certificate to American Louisiana in the absence of any evidence whatever that any of the independent producers, upon whom American Louisiana relies for its gas supply, are willing and able to deliver gas to American Louisiana. Such producers were required by the Natural Gas Act and the Commission's Rules and Regulations to file applications and to obtain certificates of public convenience and necessity in order to make sales to American Louisiana.

15. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence of gas reserves sufficient to support the project and in the absence of any evidence as to the availability or deliverability of the proposed gas supply.

16. The Commission erred in granting a certificate to American Louisiana on the basis of a patently inadequate gas supply and without any consideration of the loss of more than 25% of the needed supply by reason of the cancellation of two very substantial gas supply contracts.

17. The Commission erred in granting a certificate contemplating construction of pipelines to gather and transport gas when there is no substantial evidence that the gas will be available from the proposed sources. Such facilities include 81.9 miles of 24 inch pipeline extending from the Krotz Springs Field and from Lowry, Louisiana. In view of the cancellation of the proposed supply from Krotz Springs Field, the issuance of the certificate was capricious and unlawful.

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18. The Commission erred in granting a certificate to American Louisiana in the absence of compliance with the standards of the Natural Gas Act and the Commission's rules and regulations, solely for the purpose of attempting to prevent the cancellation by independent producers of the gas supply contracts which had not been previously cancelled. This action, which was termed "precipitate" by the dissenting Commissioners, and which was explained by the majority as having been taken "at this time, so as to make fully effective its gas purchase contracts" was officious, arbitrary, capricious and without foundation in law.

19. The Commission erred in granting a certificate to American Louisiana in the absence of any evidence whatever to show that the project can be financed under existing circumstances.

20. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence that the project is economically feasible. In the absence of a firmly committed gas supply, and without a determination of the ultimate markets to be served or the financing to be arranged, it is apparent that no rational conclusion as to economic feasibility could be reached.

21. The Commission erred in granting a certificate to American Louisiana on the basis of the fanciful proposal that Michigan Wisconsin would sell gas purchased from American Louisiana at prices substantially below the cost of such gas. It was error for the Commission to disregard the existence of Michigan Wisconsin's rate refund liability exceeding seven million dollars which necessarily must have a disastrous effect upon its ability to purchase gas from American Louisiana under the proposal made, and which was nowhere taken into account in the presentation upon which the Commission acted. This substantial defect is not cured by the Commission's reservation of action with respect to matters in Docket G-2327, and in the absence of

any finding as to the feasibility of the proposed sales by Michigan Wisconsin, the granting of the certificate to American Louisiana was unlawful.

22. The Commission erred in granting a certificate to American Louisiana in the absence of substantial evidence with respect to the availability of sufficient markets to absorb the volumes of gas contemplated by the certificate. The only testimony presented with respect to this vital question was given by the applicants themselves and was wholly conjectural. The refusal of the Commission to accept or consider any direct market evidence from the intervenors having knowledge of their own requirements until sometime after the granting of the certificate to American Louisiana, was arbitrary, unlawful and without justification.

23. The Commission erred in granting to American Louisiana a certificate which authorizes none of the acts for which certificates may be granted under Section 7(c) of the Natural Gas Act.

24. The Commission erred in granting a certificate to American Louisiana, and in finding that American Louisiana is required by public convenience and necessity, in the absence of any evidence to show that Michigan Wisconsin could not itself expand its facilities to satisfy its obligations more rapidly and at far lower cost than through the use of another subsidiary in the holding company system.

25. The Commission erred in granting a certificate to Texas Gas in the absence of substantial evidence to show that it is able to perform the service proposed by it. The showing by Texas Gas that it might have sufficient gas to perform the proposed service if all of its gas supply contracts are renewed upon expiration and if all its large direct sales contracts are terminated upon their expiration, is so patently unrealistic as to make the Commission's action, in granting a certificate to Texas Gas, capricious and unlawful.

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26. The Commission erred in granting a certificate to Texas Gas and ignoring the reliance by Texas Gas upon the continuation of deliveries of 18,000 Mcf per day from Panhandle when there is presently pending before the Commission a decision of one of its Trial Examiners permitting Panhandle to discontinue this service.

27. The Commission erred in granting a certificate to Texas Gas upon the unrealistic assumption that deliveries of 50,000 Mcf per day from Texas Gas to Ohio Fuel Gas Company will be discontinued whereas the evidence clearly shows that such gas will be needed by Ohio Fuel Gas Company.

28. The Commission erred in granting a certificate to Texas Gas in the absence of substantial evidence of sufficient gas reserves to permit the sale to American Louisiana, and by deferring until some further proceeding the necessity for Texas Gas to prove that the major source of its gas supply is capable of yielding the volumes of gas attributed to it.

29. The Commission erred in precipitately reversing its two prior orders, and without adequate notice requiring petitioner to prepare its brief and oral argument in only one working day, thereby denying petitioner due process of law with respect to the granting of certificates to American Louisiana and Texas Gas.

30. The Commission erred in omitting the intermediate decision procedure in the absence of concurrence of the parties that the Commission render the final decision in lieu of intermediate decision, and without first having entered a finding upon the record that due and timely execution of the Commission's functions imperatively and unavoidably so required. The Commission's action in this regard was in violation of Section 8 of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. 1007) and Section 1.30 of the Commission's Rules of Practice and Procedure.

Because of the many patent infirmities of the Commission's opinion and order sought to be reviewed herein, any further action either by the applicants or by the Commission predicated upon such invalid certificate would clearly contravene the public interest. The commencement of construction in reliance upon such certificate, and while this review proceeding is pending, would expose the applicants to substantial risks in view of the $130,000,000 construction costs involved in the American Louisiana application. Although in such case the applicants would have assumed the risks involved, there would undoubtedly be substantial loss to existing and prospective customers who would themselves be making substantial expenditures in anticipation of receiving gas from American Louisiana.

Besides, in the event of expenditures of such magnitude, the Commission itself would be subjected to embarrassment with respect to any subsequent proceedings contemplating further construction or operation while this review proceeding is pending in this Court. It is apparent therefore that petitioner will be prejudiced by any further action taken by the Commission or the applicants, based upon the certificates and order complained of herein, until this Court has had an opportunity to review the substantial question of law posed by the Commission's existing order.

CONCLUSION

WHEREFORE, Petitioner prays:

1. That a copy of this petition be served forthwith upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act;

2. That Respondent, Federal Power Commission, be required, in conformity with Section 19(b) of the Natural Gas Act and Rule 18(6) of this Court, to certify and file with this Court a transcript of the record upon which the order and opinion here sought to be reviewed were entered;

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3. That Petitioner be notified by the Clerk of this Court when the transcript has been received and that an order be entered herein allowing Petitioner reasonable time from the date of such notice within which to prepare the portions of the transcript to be contained in the printed record;

4. That this Court review the Commission's opinion and order issued on October 1, 1954, and upon such review, reverse and set aside each of them.

5. That this Court issue an order staying the order of the Commission herein sought to be reviewed and staying any and all further proceedings before the Commission in said Docket Nos. G-2306 et al. and any other matters or proceedings growing out of said Dockets and relating thereto pending this review and until a final Court Order has been entered in this matter.

6. That this Court exercise jurisdiction over the parties and subject matter of this petition and grant to petitioner such other and further relief in the premises as the rights and equities of the cause may require.

* * * * * * * * * *

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commisisoners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH, SEABORN L. DIGBY and FREDERICK STUECK.

In the Matters of	
AMERICAN LOUISIANA PIPE LINE COMPANY,	Docket No. G-2306
TEXAS GAS TRANSMISSION CORPORATION,	Docket No. G-2311
MICHIGAN WISCONSIN PIPE LINE COMPANY,	Docket No. G-2327
MICHIGAN CONSOLIDATED GAS COMPANY,	Docket No. G-2328

Opinion No. 276

Opinion and Order Granting Certificates Subject to Certain Conditions

These proceedings involve interrelated applications[1] seeking authorizations for certificates of public convenience and necessity for the construction and operation of natural gas facilities to serve important consuming areas in the United States.

American Louisiana Pipe Line Company (American Louisiana) by its application seeks a certificate of public convenience and necessity under Section 7 of the Natural Gas Act (Docket No. G-2306) authorizing the construction and operation of a new pipe-line system approximately 1,300 miles in length, which would extend from North Tepetate, Louisiana, to termini at Bridgman and Detroit, Michigan. The proposed pipe-line system would have an initial capacity of approximately 300,000 Mcf of natural gas per day and estimated cost of $130,700,000. American Louisiana proposes to obtain its gas supply, in part, from

[1] The above-entitled matters involving one or more questions in common respecting gas supply or proposed markets were consolidated for the purpose of hearing by an order issued February 8, 1954.

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various producing fields in southern Louisiana (approximately 250,000 Mcf per day), and in part from Texas Gas Transmission Corporation (Texas Gas) (approximately 50,000 Mcf per day).

Texas Gas seeks authority (Docket No. G-2311) to construct and operate the initial facilities which would enable it to deliver to American Louisiana at Slaughters, Kentucky, approximately 50,000 Mcf of natural gas per day. The estimated cost of Texas Gas' additional facilities is $4,300,000.

American Louisiana, from its initial capacity of 300,000 Mcf per day, proposes to deliver 100,000 Mcf per day to Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) and 200,000 Mcf per day to Michigan Consolidated Gas Company (Michigan Consolidated). Michigan Wisconsin (Docket No. G-2327) and Michigan Consolidated (Docket No. G-2328) have timely filed the necessary applications to enable them to receive and deliver such gas. Hearings on these applications have not been completed, and accordingly are not disposed of herein.

Hearings in these consolidated proceedings were commenced on March 8, 1954 and recessed August 6, 1954. Following the Commission's rejection of motions filed by various parties, American Louisiana, Michigan Consolidated, and Michigan Wisconsin on August 17, 1954, filed a joint "Application for Rehearing", and requested the Commission to enter an order: (1) directing the Presiding Examiner to certify immediately the completed record to the Commission and omitting the intermediate decision procedure; (2) Fixing the time for the filing of briefs and oral argument so that the Commission may consider and determine the merits of the applications of American Louisiana and Texas Gas prior to October 1, 1954, the date by which American Louisiana must obtain a certificate of public convenience and necessity to prevent possible termination of its gas purchase contracts; and (3) Reserving for subsequent hearing and determination subsidiary issues presented, such as determination of additional markets to

be served by American Louisiana and Michigan Wisconsin and questions involving allocation of gas, rates, financing, and related matters. Thereafter on September 3, 1954, the Commission issued an order setting these matters for oral argument on September 8, 1954, and permitting the parties to file briefs by that date. The matters were fully argued to the Commission on September 8, 1954, and briefs were filed.

MARKETS

The markets Applicant proposes to serve are in the present market areas of Michigan Wisconsin and Michigan Consolidated. Certain intervenors seek natural gas directly from American Louisiana for other communities not now served, but as yet have had no opportunity to present testimony as to their needs.

There are about 1,000 pages of testimony and 14 exhibits dealing with the markets or some part thereof. Delivery will be made directly to Michigan Consolidated at Detroit, the largest part of the total market, and elsewhere to the other markets delivery will be made by Michigan Wisconsin utilizing the increased volumes available to it. Since however, no specific portion of the market proposed to be served by American Louisiana is reserved for it, it is necessary to examine the entire market, particularly in relation to supply now available to these areas.

According to the testimony the present supply available for resale from all sources aggregates 156,950,000 Mcf annually. There can be no question but that this quantity is clearly inadequate; not only has this Commission found it necessary to restrict the growth of the load through the tariff of Michigan Wisconsin, but the Michigan and Wisconsin Commissions have found it necessary to impose stringent restrictions on the growth of load in their respective jurisdictions. The questions that need to be determined are: (1) Is there a sufficient market above the present supply to justify a project of the magnitude of American Louisiana, and (2) In view of the increased costs to the

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proposed markets associated with the American Louisiana project, can the gas be sold at a price sufficient to support the project?

In view of the importance of the market we will examine it in some detail. During 1958, the expected third year of full operation, it is estimated that residential and commercial customers, including those using gas for space heating, will require 197,728,000 Mcf. This portion of the load was estimated by multiplying the expected number of customers of each type by historically developed customer usage factors. The growth in number of customers appears to be based largely on past experience, particularly during the period when the Michigan Wisconsin system began operating. Evidence shows that a total of 60,000 new homes are expected to be connected in the Detroit district of Michigan Consolidated in the five-year period 1954 through 1958, inclusive. Were a condition of building saturation to develop, we would expect the period of diminution of new construction to require at least a few years so that we cannot find the expected rate of growth—less than two percent per year for the next five years—to be unreasonable. The end result of 58 percent residential space heating saturation in 1958 for the entire system appears to be reasonable. It is in line with experience elsewhere, where restrictions on space heating have not been as severe as the restrictions have been in these markets.

In 1958 firm industrial requirements are expected to be 34,986,000 Mcf annually. This portion of the load was estimated on the basis of percentage increase in the total, plus some volumetric increases for particular customers. Overall, the increase from 1953 actual sales of 25,144,500 Mcf to expected requirements of 34,986,000 Mcf in 1958 is an increase of 30 percent. By far the largest proportion of the increase is in Wisconsin, which area has been under restrictions on industrial sales practically since natural gas was first introduced into the area. The expected rise for Michigan Consolidated is nominal, being from 19,372,600 Mcf in 1953 to 20,339,000 Mcf in 1958.

Assuming that all existing supplies of gas to the Michigan Consolidated and Michigan Wisconsin markets were utilized for firm service, the record shows that 69 percent of the gas proposed to be delivered by American Louisiana to these markets would be needed for the remaining firm requirements expected in 1958. Based upon firm deliveries only, 69 percent of the total capacity would be insufficient to support a project of the magnitude proposed by American Louisiana. The rest of the market consists of so-called off-peak industrial and interruptible industrial load. We can find little distinction between these classes and will discuss them together. Applicant claimed a total potential of 51,006,400 Mcf in these classes for the year 1958. Evidence presented by the coal interests claimed that this potential load included nearly 20,000,000 Mcf of boiler fuel in Detroit and Milwaukee alone, which, on the basis of strict economics, could and may be served by coal. Applicant points out that by far the largest part of this boiler fuel market is now using liquid fuel with equivalent costs in 1952 above the expected selling price of gas. Under that condition it would be reasonable to expect that gas could and would acquire a substantial portion of the load.

The evidence shows that 11,927,400 Mcf of interruptible gas was sold in 1953 with only a limited gas supply and under restrictive orders of both this Commission and the respective State Commission, which orders were designed to protect the gas supply for already attached smaller customers, principally in the residential and commercial classifications. We find nothing in the record to indicate that such volume of interruptible gas cannot be sold in the future. This amounts to nearly eleven percent of the entire volume to be made available from American Louisiana. This would give a total market for nearly 80 percent of the American Louisiana gas. Experience discloses that various pipe lines operating under the jurisdiction of this Commission are successfully operating at such load factors.

The record is clear that there exists a substantial additional interruptible market in both territories proposed to

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be served which, in fact, is shown to exceed the estimated total volume of gas to be available in 1958 from all sources, including American Louisiana, by 19,030,000 Mcf per year. Whether or not the estimate of American Louisiana that such additional requirements, together with those of intervenors seeking gas supplies, will enable it to operate its system at 100 percent load factor will require further evidence. The conclusion is inescapable that there exists a market sufficient to support the construction of a project of the magnitude proposed by American Louisiana. This finding suffices for the present, but our order herein will provide, as we have done in numerous cases heretofore, for continuation of the proceedings to determine more particularly the disposition of the gas to be made available through these projects.

DESIGN AND FEASIBILITY OF THE PROJECT

American Louisiana is proposing to build a total of 1,288.6 miles of pipe line, and three compressor stations with an aggregate of 30,000 Bhp installed. The main line from North Tepetate, Louisiana, to Detroit, Michigan, will consist of 1,004 miles of 30-inch pipe line with the three compressor stations. From a point on the 30-inch line near Payne, Ohio, to a point on the Michigan Wisconsin system near Bridgman, Michigan, American Louisiana proposes to construct 117 miles of 22-inch line. From Krotz Springs, Field and from a point near Lowry, Louisiana, a total of 81.9 miles of 24-inch are proposed. A total of 85.7 miles of smaller diameter supply laterals in Louisiana is also proposed.

The system as designed by American Louisiana is intended to deliver an average of 300,000 Mcf per day to Michigan Consolidated and Michigan Wisconsin. This is true whether all of the gas is taken from the fields in southern Louisiana or a substantial portion is taken from Texas Gas Transmission Corporation. The principal design question that appears on the record is the need for the 22-inch line from Payne, Ohio, to Bridgman, Michigan. Applicant

has stated that the construction of the 22-inch line is related to the matter of the allocation of gas between Michigan Consolidated and Michigan Wisconsin. American Louisiana proposes delivery of 200,000 Mcf to Michigan Consolidated and 100,000 Mcf per day to Michigan Wisconsin. Certain intervenors also request gas supplies in these proceedings. The appropriate allocation of the total supply to be made available must depend on the further proceedings to be held as ordered herein. In view of the present state of the record it is our belief that the question as to the need or desirability of the 22-inch line being authorized should be deferred until these further proceedings are concluded.

We find the remainder of the proposed American Louisiana system to be reasonably adequate to render the service proposed and to be required by the present and future public convenience and necessity.

While as noted under the discussion of markets, we expect the proposed line will operate at a high load factor, the possibility is always present that conditions not foreseen by Applicant may result in a lesser demand for gas than forecast and hence the higher average costs associated with lower load factor operation. This and other considerations impel us to study the record to determine what these costs might be. Applicant's proposed rate of $2.90 per Mcf demand charge and 30 cents per Mcf commodity charge would yield the following average rates per Mcf at the load factors indicated:

75%	42.71¢
80%	41.92¢
85%	41.22¢
90%	40.59¢
95%	40.04¢
100%	39.53¢

Michigan Wisconsin has indicated that after the increased supplies are received, it expects to be able to sell

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gas for about 35 cents per Mcf. While it is probably true that the influx of higher cost American Louisiana gas into the Michigan Wisconsin system will mean some upward adjustment in its rates, such adjustment should not increase the cost of service to a point where a rate in excess of 35 cents would be required. Michigan Wisconsin studies show that a 35 cent rate will yield a return of 6 percent or more and that the company has been selling all the gas it has had at that rate for sometime. Michigan Consolidated has indicated and presented evidence that it can absorb the proposed rate of American Louisiana without affecting its existing rates, which are subject to the jurisdiction of the Michigan Commission. That Commission, as well as the City of Detroit, County of Wayne, Michigan, and the Public Service Commission of Wisconsin, have actively participated in these proceedings and strongly urge the issuance of the certificate to American Louisiana on this record at this time.

While it is impossible, at this time, to determine precisely what the American Louisiana cost of service, and its rates, may be until the further proceedings ordered herein have been concluded, it is our firm opinion that American Louisiana can sell the gas at a price which will support the project. We will, therefore, condition this certificate to require that American Louisiana file a schedule of rates satisfactory to the Commission at least 60 days prior to commencement of service.

American Louisiana proposes to finance its facilities by the issuance of $97,500,000 of 4¼ percent first mortgage bonds, $12,000,000 of interim notes convertible into a like amount of preferred stock and $20,500,000 of common stock. The company has already entered into bond purchase agreements with two insurance companies covering the disposition of the bonds. While it is questionable that the financing can be consummated at this time, in the absence of appropriate certificates being issued to the independent producers proposing to supply the gas to American Louisi-

ana, we believe there is no question that the project can be financed when this requirement has been met.

Under the bond purchase agreements American Louisiana may not redeem its bonds during the first ten-year period following the date of the bonds at an interest rate of less than 4¼ percent. We find this condition to the purchase of the bonds unsatisfactory. We will, therefore, further condition the certificate by requiring American Louisiana to submit a plan of financing satisfactory to the Commission 30 days prior to commencement of construction.

GAS SUPPLY

Gas Supply of American Louisiana

American Louisiana's gas supply to meet the estimated requirements of its proposed system is to come from two principal sources, namely, reserves dedicated under contracts with independent producers and purchasers from Texas Gas Transmission Corporation.

The major portion of the supply is to come from its purchases under contracts with producers. Testimony of record shows that as of September 1953, the recoverable reserves available to American Louisiana from this source totaled 2,632,598 MMcf. Reducing this volume by 255,395 MMcf, estimated for untested and unproven reservoirs, results in an availability life of 14 years to 17 years depending upon the recovery factor applied to water drive reservoirs.

Subsequent drilling has increased the estimated volumes in place to 2,958,392 MMcf and reduced the untested and unproven reservoir volumes to 184,494 MMcf as of June 1954. Whether or not any of such additional reserves can be delivered to the pipe line under the proposed plan of operation has not been demonstrated. In the absence of a revised study of availability of gas reserves under the proposed plan of operation, no definite conclusion can be reached as to the precise effect of such additional gas re-

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serves in place on the project. It is reasonable to suppose, however, that some portion of such additional reserves will be available to this project if needed.

The correct recovery factor to be applied to a water drive reservoir cannot be ascertained at this time. Opinions of experts in these matters differ widely and only future production history can prove the correctness of assumptions now made. It is not necessary that the Commission determine the correctness of any specific estimate; it is sufficient that we find that the reserves of natural gas are reasonably adequate to meet the proposed requirement from this source. We find that the gas reserves available to American Louisiana under purchase contracts are reasonably adequate, in terms of volume and deliverability, to meet the requirements of the proposed project from that source. Certain legal considerations relating to this source of gas are discussed below.

The Texas Gas Project

Texas Gas is proposing in Docket No. G-2311 to sell 18,615,000 Mcf annually (51,000 Mcf on an average day) to American Louisiana at a point near its existing Slaughters, Kentucky, Compressor Station. In order to make this delivery (up to 102,000 Mcf on a day of peak delivery) it is proposing to install approximately 48.20 miles of 26-inch loop line along its existing system between Memphis, Tennessee, and Slaughters, an additional 1,500 Bhp compressor unit in its existing Covington station and a sales meter station. The delivery will be made utilizing idle, off-peak capacity in its existing system south of Memphis. The proposed additional looping will complete a second 26-inch line from Memphis to a point beyond Slaughters.

The over-all cost of construction is estimated to be $4,281,135. Texas Gas proposes to finance this project temporarily with a $4,000,000 bank loan, this bank loan to be repaid out of a part of the proceeds of a large bond issue expected in the future. Texas Gas has been advised by

one of the banks with which it is now doing business that this loan will be available when required.

Gas Supply of Texas Gas

Texas Gas proposes to sell 18,615,000 Mcf of firm off-peak gas annually to American Louisiana from its existing sources of supply. Some question was raised as to the ability of Texas Gas to supply American Louisiana in addition to its existing markets in view of the uncertainties of the future requirements of the existing customers of Texas Gas, the divergence of views of several geologists and engineers concerning the remaining gas reserves in the Carthage Field, and the possible termination of certain contracts of Texas Gas with is suppliers.

We find merit in Texas Gas' arguments that the proposed sale to American Louisiana will ultimately redound to the benefit of the customers of Texas Gas in that it will increase the system load factor, make it easier for Texas Gas to live within the minimum take-or-pay provisions of its gas purchase contracts, enable Texas Gas to buy additional gas for future expansion, and provide a diversity of load as insurance against decreased sales from mild weather or unfavorable economic conditions in the territory presently being served.

We have also given consideration to the letter to Texas Gas from The Ohio Fuel Gas Company (Ohio Fuel) which indicates a desire on the part of Ohio Fuel to convert the present interruptible desliveries from Texas Gas to firm service and possibly discontinue the interruptible deliveries after 1958.

As shown by the Ohio Fuel letter it is impossible to predict at this time what the circumstances will be in 1958 when the present interruptible contract expires. Texas Gas will at that time, however, be required to obtain additional supplies of gas to firm up such service, if desired by Ohio Fuel, and in the meantime will, under the proposed plan of service to American Louisiana, be maintaining its

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ability to serve a substantial off-peak market, which will result in more economical service to its other customers. In any event Texas Gas will be able to more effectively plan its gas procurment program consistent with the future plans of Ohio Fuel and its other customers as they materialize. Furthermore, while it appears Texas Gas has not completely answered the questions raised on the record with respect to its showing of gas reserves in the Carthage Field, under the circumstances described above we do not believe that we can or need to resolve all these issues at this time. Texas Gas should, however, be prepared in any future proceeding involving proposed increased deliveries to fully support the availability of its Carthage reserves.

There is no question that the proposed construction and operation by Texas Gas is and will be required by the present and future public convenience and necessity and that Applicant will be able to carry out its proposal as presented.

Staff objected to the use by Texas Gas of its proposed ACQ-3 rate schedule because such rate applicable in Zone 3 is greater than the company's present storage rate IS-4 applicable in Zone 4 for what is substantially the same type of service. We will condition the certificate to Texas Gas on the latter's filing a satisfactory rate for the sale of gas to American Louisiana 60 days prior to the commencement of service.

Based on the above, it is concluded that the supply of gas available to American Louisiana, including that to be received from Texas Gas, is reasonably adequate to support the proposed project as presented.

LEGAL CONSIDERATIONS RELATING TO GAS SUPPLY

Clearly, except for the Supreme Court's decision in the case of *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672, on June 7, 1954, American Louisiana and Texas Gas would at this time be granted the certifi-

cates which they seek, subject only to the conditions as to allocation of gas, rates and financing provided herein. That case decided that the provisions of the Natural Gas Act require this Commission to regulate the sale for resale of natural gas by independent producers in interstate commerce.

The Commission, implementing the *Phillips* decision, issued Order 174-A, in Docket No. R-138, setting forth the detailed procedures to be followed by producers of natural gas in securing the requisite certificates of public convenience and necessity and complying with the provisions of the Natural Gas Act. The original order required producers making such sales to apply for such certificates by October 1, 1954. However, after a public hearing, and a showing by many of the producers affected that the filing requirement by October 1, 1954, would work a hardship on them, the Commission on September 24, 1954, amended Order 174-A, and extended the filing date until December 1, 1954. We perceive no valid reason for requiring American Louisiana's producers to file their applications at an earlier date. On June 7, 1954, there were two major gas certificate cases, including the present proceeding, pending before the Commission. The record had been closed in the other case, and the Commission did not reopen that record on account of the *Phillips* decision, and granted the certificate therein sought. The applications under consideration had been filed and a major portion of the hearings had been completed. The problem with which we are now confronted is a determination of the method to be followed in applying the requirements of the *Phillips* decision to the present proceedings.

Under the Natural Gas Act, Congress delegated to this Commission necessary powers to enable it to carry out the over-all purposes of the Act. The means and methods which are to be employed in effectuating this result are left to the administrative discretion of the Commission. We recognize the necessity of securing full compliance with

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the Natural Gas Act as interpreted by the Supreme Court in the *Phillips* case and the conditions included in this order so provide. We differ with our dissenting colleagues only in the method to be followed in bringing about such compliance in the particular circumstances of this case so that the public interest may best be served.

American Louisiana's gas purchase contracts provide that the sellers shall have the right to terminate same on or after October 1, 1954, unless American Louisiana shall have notified sellers that it has secured a certificate of public convenience and necessity from this Commission. In the event such a certificate is not issued prior to October 1, 1954, that alone, in spite of the fact that American Louisiana's project is otherwise feasible, might well result in a failure of the project. This would deprive the consuming public in the area to be served of the much needed gas which American Louisiana proposes to provide. It appears from the uncontradicted evidence in these proceeding that there is a crying demand for additional quantities of natural gas in the Michigan-Wisconsin area, which, if not satisfied by the American Louisiana project, may not be satisfied for a considerable period of time. We do not believe that it would be consistent with our responsibilities, during this transitional period resulting from the *Phillips* decision, and in view of the large unsatisfied demand for natural gas in the area to be served, for us to adopt any procedure for enforcing the mandate of the *Phillips* decision, which might result in a collapse of the American Louisiana project to the detriment of the public welfare. We will, therefore, issue a certificate to American Louisiana at this time so as to make fully effective its gas purchase contracts, including, however, a condition that American Louisiana may not commence construction of the project until its suppliers have fully complied with the Natural Gas Act as interpreted by the *Phillips* decision.

INTERVENERS

Panhandle Eastern Pipe Line Company, which company also serves Michigan Consolidated, has intervened in opposition to the granting of the application, alleging competition. We do not find, however, any proposal by Panhandle to meet additional needs of Michigan Consolidated or of the other customers of Michigan Wisconsin. Accordingly, we do not see wherein Panhandle may be aggrieved by the granting of a certificate to American Louisiana.

Interveners representing coal, labor, and railroad interests oppose the granting of a certificate to American Louisiana in these proceedings upon the grounds that natural gas to be made available to consumers in the area here involved will cause a displacement of coal as a fuel to the detriment of producers and transporters thereof. As pointed out above, however, it would appear that such natural gas as may be sold for boiler use will largely displace liquid fuels rather than coal. The evidence definitely establishes a need for natural gas by the consuming public in said area, which should be met without further delay. There is, indeed, nothing in the record to indicate that it would be in the public interest to deny these consumers the use of natural gas as proposed.

Findings and Conclusions

In reaching the findings, conclusions, and decisions herein, the Commission has considered the evidence of record, the briefs and reply briefs, the proposed findings and conclusions submitted by parties to the proceedings and the oral arguments. On the basis of the record herein, all proposed findings and conclusions submitted for the Commission's consideration are hereby rejected except so far as the same have been adopted in this opinion and order.

Upon consideration of the foregoing and the entire record the Commission *finds:*

(1) That timely execution of the Commission's functions under the Natural Gas Act imperatively and unavoid-

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ably requires the omission of the intermediate decision procedure in these proceedings.

(2) American Louisiana Pipe Line Company, a Delaware corporation having its principal place of business in Detroit, Michigan, upon completion of construction authorized herein, will become a natural-gas company within the meaning of the Natural Gas Act.

(3) Texas Gas Transmission Corporation, a Delaware corporation, with its principal place of business in Owensboro, Kentucky, is a natural-gas company within the meaning of the Natural Gas Act, as found by the Commission in Docket No. G-859 (8 FPC 190).

(4) The facilities which American Louisiana and Texas Gas propose to construct and operate, as more fully described in their applications at Docket Nos. G-2306 and G-2311, respectively, for the transportation and sale of natural gas in interstate commerce, subject to the jurisdiction of the Commission, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) The construction and operation of facilities by Texas Gas and by American Louisiana, as authorized herein, are required by the public convenience and necessity and certificates therefor should be issued as hereinafter ordered, upon the terms and conditions of this order, which terms and conditions are reasonable and required by the public convenience and necessity.

(6) Texas Gas and American Louisiana are able and willing properly to do the acts and to perform the services authorized herein, and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder.

(7) The applications of Michigan Wisconsin Pipe Line Company, Docket No. G-2327, and Michigan Consolidated Gas Company, Docket No. G-2328, together with all petitions seeking gas service from American Louisiana and Michigan Wisconsin, in these proceedings should be reserved for further disposition, together with those matters in American Louisiana Pipe Line Company, Docket No. G-2306, specified herein, subject to further order of the Commission.

The Commission *orders:*

(A) The intermediate decision procedure in the above-entitled matters be and the same is hereby omitted.

(B) A certificate of public convenience and necessity be and the same is hereby issued authorizing American Louisiana to construct the facilities hereinbefore referred to, which are more fully described in its application in Docket No. G-2306, for the transportation and sale of natural gas, subject to the jurisdiction of the Commission, upon the terms and conditions of this order. The following conditions are hereby attached to the exercise of the rights granted under the certificate issued American Louisiana herein:

(i) American Louisiana shall not undertake the construction of any facilities for which a certificate has been issued herein unless there have been filed with the Commission prior to December 1, 1954, applications for certificates of public convenience and necessity to supply gas sufficient to support this project and until such certificates have been issued and accepted by the respective applicants.

(ii) The deliveries and sales of gas to be made by American Louisiana, together with the question of the authorization for the construction of the

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117 miles of 22-inch line hereinbefore referred to, are hereby made subject to further order of the Commission in this proceeding.

(iii) American Louisiana shall transport and sell no more than 111,946,000 Mcf at 14.73 psia per year, the disposition of which is hereby made subject to further order of the Commission.

(iv) American Louisiana shall file a schedule of rates satisfactory to the Commission not less than 60 days prior to commencement of service.

(v) American Louisiana shall file a plan of financing satisfactory to the Commission at least 30 days prior to commencement of construction of the facilities herein authorized.

(C) A certificate of public convenience and necessity be and the same is hereby issued authorizing Texas Gas to construct the facilities hereinbefore referred to, which are more fully described in its application in Docket No. G-2311, for the transportation and sale of natural gas subject to the jurisdiction of the Commission, upon the terms and conditions of this order. The following conditions are hereby attached to the exercise of the rights granted under the certificate issued Texas Gas herein:

(i) Texas Gas shall not commence construction of facilities until suppliers of natural gas from whom Texas Gas purchases gas shall comply with Commission Order No. 174-A, as amended, where applicable.

(ii) Texas Gas shall deliver and sell no more than 18,615,000 Mcf at 14.73 psia per year to American Louisiana on a firm basis unless otherwise ordered by the Commission.

(iii) Texas Gas shall not undertake the construction of any facilities for which a certificate has been

issued herein until the condition contained in the certificate issued to American Louisiana under paragraph (B)(i) shall have been complied with.

(iv) Texas gas shall file with the Commission at least 60 days prior to the commencement of service a rate schedule satisfactory to the Commission.

(D) Hearings on the applications of Michigan Wisconsin Pipe Line Company, Docket No. G-2327, and Michigan Consolidated Gas Company, Docket No. G-2328, together with all petitions seeking gas service from American Louisiana and Michigan Wisconsin in these proceedings and the matters specifically reserved for further disposition in American Louisiana Pipe Line Company, Docket No. G-2306, shall be subject to further order of the Commission.

(E) These certificates issued in paragraphs (B) and (C) hereof, together with the conditions attached thereto, shall be accepted in writing by responsible officials of American Louisiana and Texas Gas respectively, within 120 days of their issuance.

(F) The certificates issued herein are not transferable and shall be effective only so long as American Louisiana and Texas Gas continue the operations hereby authorized in accordance with the provisions of the Natural Gas Act, and any pertinent rules, regulations or orders heretofore or hereafter issued by the Commission.

By the Commission. Chairman Kuykendall and Commissioner Digby dissenting.

J. H. GUTRIDE,
Acting Secretary.

Adopted: September 30, 1954.
Issued: October 1, 1954.

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In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, *et al.* } Docket No. G-2306, *et al.*

KUYKENDALL, Chairman and DIGBY, Commissioner, dissenting:

We believe our order of August 13, 1954, is correct and should stand, and that a certificate of convenience and necessity cannot lawfully be issued to American Louisiana on the existing record.

The assertions that this Commission has by its issuance of said order, stood on a bare legal technicality and therefore unnecessarily delayed or precluded the delivery of natural gas to large segments of the public deserve refutation. No one disputes the fact that the decision of the Supreme Court in the *Phillips Petroleum Company* case, 347 U. S. 672, (decided June 7, 1954) makes it mandatory that independent producers of natural gas, such as those with whom American Louisiana has contracts, obtain certificates of convenience and necessity, just as interstate transmission companies must do.

From experience, this Commission has found that interdependent applications for certificates must necessarily be considered and processed jointly. Section 7(c) of the Natural Gas Act requires the Commission to find that the "* * * applicant is able and willing properly to do the acts and perform the services proposed * * *" before a certificate can be issued. If two or more natural gas companies propose to share in the construction of one entire project, the Commission cannot make a finding that one applicant is "able and willing" unless it can find that the other applicants, on whom the first applicant depends, are also "able and willing".

This Commission's order No. 163 became effective on September 15, 1952, more than a year before American Louisiana and the other applicants filed their applications herein. Section 157.13(c) thereof provides as follows:

> "When an application considered alone is incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed. When applications are interdependent, they shall be filed concurrently."

After the *Phillips* decision this Commission adopted Order 174-A which contains a similar provision in Section 157.23 (b) thereof which is as follows:

> " * * * In those instances where a certificate of public convenience and necessity is required of a natural-gas company for the construction or operation of facilities to enable it to take natural gas from another natural-gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously."

Obviously, simultaneous filing was not possible in this instance, but that does not mean that no filing at all, by the independent producers is or should be required before a certificate is issued. The fair and necessary requirement is that the producers file their applications so that they may be considered along with the other interdependent applications.

We would not require strict and unreasonable adherence to this rule during this period of transition and unsettled conditions in the natural-gas industry, due to the *Phillips* decision, if we had any satisfactory proof that American Louisiana's suppliers are able and willing to do what must be done, in order to enable American Louisiana to do what it proposes to do. But this proof is wholly lacking. In fact, two suppliers, representing about twenty-five percent of the gas American Louisiana had contracted for, have indicated clearly in petitions seeking reconsideration of our Order 174-A, which are on file with this Commission, and of which we take notice, that they consider their contracts at an end.

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The filing of applications by the producers is a relatively simple clerical task, insofar as they are concerned. It is much more than fulfillment of a technical requirement insofar as the Commission is concerned. Such a filing would show the producers' willingness, which the law requires. The applicant has already introduced some evidence concerning the producers' ability. Proof both of ability and willingness is required under the law.

The cases which counsel for the applicant has cited, wherein conditional certificates were issued and upheld, are clearly distinguishable from this case. In the cited cases, the conditions were imposed on the applicant, who could meet the conditions, or refuse the certificate, as he saw fit, or the conditions were imposed upon a party affiliated or associated with the applicant who was controlled by the applicant or who had already shown ability and willingness to meet the condition if imposed, or the condition was one merely requiring compliance with certain laws or regulations, which presumptively, as a matter of law, could be done.

We find no analogy between this case and the *Pacific Northwest Pipe Line* case, Docket No. G-996, *et al.*, referred to but not specifically designated by the majority, which was decided after the Supreme Court's decision in the *Phillips* case. The hearing was concluded in that case before the Phillips decision and the issue of regulation of producers was not presented. Even on rehearing, the rival applicant did not raise the issue, and it was not actually presented by any other parties in their petitions for rehearing, although one or two intervenors made passing reference to the point. Manifestly, we cannot go back into the past and rehear and redecide all cases which might have been affected by the *Phillips* decision. Here the issue is squarely presented to us on the record in a pending case, the first certificate case of this kind to come to us.

We are not at all convinced of the soundness of the argument that the applicant must have a certificate by October 1, 1954, in order to be able to hold its suppliers to their con-

tracts. If the suppliers, by their own conduct, have prevented the applicant from performing under its contracts, with them, then they, the suppliers, cannot escape their contractual responsibility by claiming the applicant has defaulted. Hence, the October 1 deadline, which may have existed, prior to the *Phillips* decision, has now been erased. We do not even find it necessary, at this time, to impose another deadline on American Louisiana producers, as the majority has done.

We have no question concerning the demand for natural gas in the markets which this project proposes to serve. We have no doubt that this market can use all the gas the applicant originally hoped to deliver, and more too, provided the price is low enough. It is impossible to determine, at this time, what prices are necessary to make the project feasible, and whether those prices would be competitive with other fuels.

The applicant, in the hearing, submitted a plan of financing which was much more comprehensive and detailed than this Commission has required in the past. This plan was based on the applicant having a twenty-year gas supply verified by a geologist of the investors' choosing. The geological testimony approving the gas supply is not in the record, and of course, the gas supply is not now available.

We do not say that the applicant is restricted to the original plan of financing proposed, and we do not say that a suitable plan of financing could not be evolved later. We do say that there is nothing in the record now to indicate that the project can be financed at this time, and it is obvious that it cannot be financed until the applicant has an adequate gas supply available.

We recognize that a certificate case is not a rate case. Nevertheless, we are concerned about the producers' prices, as shown in their contracts, which are among the highest, if not the highest, known to this Commission. We realize that natural gas from the Gulf area necessarily is more expensive than gas from many other areas. We are mindful

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that we now have purisdiction over the producers' prices, and could, after the producers' rates are filed, and service has commenced (assuming this happens) bring proceedings against the producers, looking toward rate reductions. Nevertheless, these rates must and should be accepted at the outset.

We do not pass on the reasonableness of the producers' rates, but we do say this problem, in the first, precedent setting, certificate case since the *Phillips* decision, deserves consideration which is not being given here, and cannot be given, under the present state of the record.

When the hearing recessed on August 6, applicant made it clear that it intended to introduce more evidence when the hearing reconvened on September 13. In the meantime, applicant changed its position, and stated the record was complete. We are at a loss to understand why, and regret that the applicant did not utilize the opportunity it had to fill in some of the gaps in the record which we have mentioned, including evidence concerning economic feasibility and marketability.

Since the available gas supply, if any, of American Louisiana is unknown at this time, how can we determine what the design and capacity of the pipeline should be?

Since the available gas supply, the cost thereof, the design, capacity, and load factor of the pipeline are not known at this time, how can we determine whether or not the project is feasible?

We do not believe that precipitate action is required in this case. American Louisiana, in its application filed approximately a year ago, stated that it did not propose to start construction until the spring of 1955. The Supreme Court's decision on Phillips' petition for rehearing, which probably will be made in October of this year, will (no matter what it may be) undoubtedly clarify the position of many of the producers.

We believe that the document which is being issued to the applicant is not, in law, a certificate of public convenience and necessity.

We would be in favor of denying American Louisiana and Texas Gas certificates of public convenience and necessity and dismissing their applications. We believe that an order setting forth the Commission's views on questions of fact justified by the record and affording an opportunity to the applicants to make further proof concerning issues not justified at this time by the record would be a sounder approach than that taken by the majority of the Commission. We are further of the opinion that an order of this character would afford the applicants as much legal protection concerning their purchase contracts as does the action of the majority.

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JEROME K. KUYKENDALL,
Chairman.

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SEABORN L. DIGBY,
Commissioner.

Filed: September 30, 1954.
Issued: October 1, 1954.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Order Denying Motion for Recess

Panhandle Eastern Pipe Line Company, intervener, in the above-consolidated proceedings made a motion on July 23, 1954, that the Presiding Examiner, recess the hearing "pending the filing of applications for certificates of public convenience and necessity by all the intended producers, suppliers of this project." The motion was opposed by counsel for applicants. The examiner, being of opinion that the motion related to a matter involving determination of Commission policy, certified the record applicable thereto to the Commission. The hearing has proceeded pending our disposition of the motion.

Congress has enjoined upon this Commission administration of the Natural Gas Act. We do not have power to alter

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or modify the provisions of that Act. Our power, duties and function are to administer, not legislate. Determination that a certificate of public convenience and necessity shall issue must be made by application of standards prescribed by Congress in the Act. These standards must be met and the burden of proof in that respect is upon each applicant,—in the instant case American Louisiana.

Section 7(c) of the Act provides:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . .

Section 7(e) provides:

> . . . a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

Congress has required findings based upon the evidence adduced of record that the "applicant is *able* and willing properly to do the acts and to perform the services proposed . . ., otherwise such application shall be denied." (Emphasis supplied). Prerequisites to a finding that an

applicant is "able" to do the acts and perform the services proposed, are *inter alia*, subsidiary findings relating to gas supply, economic feasibility, marketability and adequacy of design and capacity. Where the record is deficient with respect to any of such findings there is no basis upon which the finding required by the Act can rest.

Whatever may have been conceived to be the scope of the Act prior to the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, decided June 7, 1954, the Supreme Court has now declared that a producer or gatherer who is engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale is a "natural-gas company" subject to the provisions of the Natural Gas Act.

Issuance of Order No. 174 on July 16, 1954, represents merely a necessary step in our endeavor reasonably to administer the law. The requirements of § 157.23 are not the source of any rights or privileges nor do they impose any restrictions upon existing rights or privileges. Rights and duties have their source in the Act, not in rules and regulations promulgated by us. Rules and regulations are merely tools to be used to implement and to make effective the provisions of the Act.

The record in the instant proceedings has not been closed. Taking of testimony is in progress and applicants have indicated that further direct testimony will be presented. A substantial number of interveners have stated their intention to present evidence relating to their requests for allocations of gas. In these circumstances, the record should present for our simultaneous consideration the present applications and the applications of those persons upon whom American Louisiana proposes to rely for its supply of gas. The circumstances in this case afford an opportunity for and the public interest requires that these related *and interdependent applications* for certificates of public convenience and necessity be considered simultaneously on this record before any certificate of public convenience and necessity should issue.

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It may be that those producers who heretofore have been regarded as exempted from or beyond the scope of the Act may not be fully prepared to file applications forthwith. We have deliberately simplified our regulations to facilitate such filings. We assume that the producers here who have agreed to supply American Louisiana will remain desirous of supplying natural gas for the latter's proposed project. Immediate recess of proceedings might delay the reception of evidence into the record in the proceedings. We are of opinion, therefore, in the circumstances that the motion of Panhandle for an indefinite recess should be denied and we will direct that the hearings continue through August 6, 1954, at which time there shall be a recess. Hearings shall reconvene September 13, 1954.

The Commission *orders:*

(A) The motion of Panhandle Eastern Pipe Line Company for an immediate recess in the above-captioned proceedings and the same is hereby denied.

(B) The hearing shall continue through August 6, 1954, at which time said hearing shall be in recess to be reconvened September 13, 1954.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: July 30, 1954.
Issued: August 2, 1954.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Order Denying Motion for Division and Determination of Issues, for Omission of Intermediate Decision Procedure and Request for Fixing of Dates for Briefs and Oral Argument

American Louisiana Pipe Line Company (American Louisiana), Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) and Michigan Consolidated Gas

Company (Michigan Consolidated), on July 19, 1951, filed a joint "Motion for Action to Permit Prompt Determination of the Certificate Application of American Louisiana Pipe Line Company." Movants request, in effect, the Commission to separate the issues in these consolidated proceedings upon the several interdependent applications for certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, and to complete the hearing and determine the matters of public convenience and necessity insofar as they concern the application of American Louisiana. Movants further request the Commission (1) to reserve for subsequent hearing and determination other issues presented in the consolidated proceedings, including determination of additional markets to be served by American Louisiana, Michigan Wisconsin and Texas Gas Transmission Corporation (Texas Gas), questions involving allocation of gas, rates and related matters; (2) to omit the intermediate decision procedure; and (3) to fix dates for filing of briefs and for oral argument.

Texas Gas, on July 19, 1954, filed its concurrence and joinder in the aforesaid motion. Answers in support of or in opposition to such motion have been filed by numerous interveners in the proceedings. Those answers filed in support of the motion are premised upon the assumptions that (1) a certificate *must* be issued to American Louisiana prior to October 1, 1954, otherwise there will be no gas supply available for the proposed project, and (2) if we grant the joint motion for division of the issues instanter a certificate of public convenience and necessity will be issued to American Louisiana. Such assumptions are wholly unwarranted.

We stated in clear and unambiguous language in our "Order Denying Motion for Recess" in these proceedings on August 2, 1954, that in the absence of applications by the proposed suppliers no favorable action could be taken upon the respective applications. Uncertainty regarding the intention of those suppliers of gas in that regard emphasizes the void in the present record. Whether that void will or

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will not be filed is not a matter within the power of this Commission to control. That power is possessed by persons not parties to these proceedings.

Our determination in these consolidated proceedings, as in all other proceedings, will be based on the merits of the applications and the merits of the showing made by the Applicants in support thereof. In our "Order Denying Motion for Recess" issued in these proceedings on August 2, 1954, we stated, among other things, as follows:

> "Congress has required findings based upon the evidence adduced of record that the 'applicant is *able* and willing properly to do the acts and to perform the services proposed . . ., otherwise such applications shall be denied.' (Emphasis supplied). Prerequisites to a finding that an applicant is 'able' to do the acts and perform the (sic) services proposed are *inter alia*, subsidiary findings relating to gas supply, economic feasibility, marketability and adequacy of design and capacity. Where the record is deficient with respect to any of such findings there is no basis upon which the finding required by the Act can rest." (Mimeo., p. 2)

Until the foregoing specified prerequisites have been met there is no basis, nor can there be any, upon which we could find that a certificate of public convenience and necessity should be issued.

Counsel for American Louisiana has indicated on the record Applicants' desire to present additional testimony on the marketability of the gas from its proposed system. Under our outstanding order such testimony cannot be presented earlier than September 13, 1954. It is our expectation that by such date the producers upon whom American Louisiana proposes to rely for its natural gas supply will have filed applications for certificates of public convenience and necessity authorizing the operations incident to, and the sale of, natural gas to American Louisiana. Failure, however, of one or more of the producers to file an appropriate application might ultimately effect changes in the contemplated system capacity and the volumes available

for ultimate disposition to markets with resultant effects upon rates, financing and economic feasibility of the projects covered by the interdependent applications. For American Louisiana has premised its entire case upon the availability and salability of 300,000 Mcf of natural gas per day.

Wherefore, in view of the foregoing, the Commmission *orders:*

> The joint motion filed by American Louisiana Pipe Line Company, Michigan Wisconsin Pipe Line Company, and Michigan Consolidated Gas Company filed in these proceedings on July 19, 1954, and the separate motion of Texas Gas Transmission Corporation joining and concurring in the aforegoing motion filed July 19, 1954, be and the same hereby are denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: August 12, 1954.
Issued: August 13, 1954.

Answer of Panhandle Eastern Pipe Line Company to Motions to Dismiss Its Petition for Review

Comes now Panhandle Eastern Pipe Line Company, the Petitioner in the above-styled cause, and for answer to the several motions of the Respondent, the Federal Power Commission, the Intervenors, American Louisiana Pipe Line Company, Michigan Wisconsin Pipe Line Company, and Michigan Consolidated Gas Company, and the Intervenor, Texas Gas Transmission Corporation, to dismiss Panhandle's Petition for Review heretofore filed herein, respectfully represents and shows to this Honorable Court the following:

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1. *Contrary to the assertions of Movants, Panhandle's Review Petition expressly alleges and shows that Panhandle is an "aggrieved party" within the meaning of Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b))*

After reciting prior chronology of the proceeding, Panhandle's Review Petition at page 6 specifically states:

> "*Being aggrieved by such order and opinion,* Panhandle filed with the Commission on October 15, 1954, its application for rehearing and stay of said opinion and order."[1]

Then, after quoting Section 19(b) as the section of the Natural Gas Act upon which jurisdiction and venue are based, Panhandle's Review Petition at page 7 expressly alleges, among other things:

> ". . . Petitioner was a party to the proceedings before the Commission wherein the Commission entered the opinion and order hereinabove referred to *and is aggrieved by each of them.*"

More important still, the more detailed facts which show that Panhandle is an aggrieved party are fully set forth at pages 3 and 4 of the Review Petition, as follows:

> "American Louisiana proposed by means of this project to supply natural gas only to its two affiliates, Michigan Wisconsin and Michigan Consolidated, for resale to their respective customers in the States of Michigan and Wisconsin. American Louisiana proposed to furnish about 100,000 Mcf per day to Michigan Wisconsin and about 200,000 Mcf per day to Michigan Consolidated. *At the present time Michigan Consolidated receives about 58% of its supply of natural gas from Michigan Wisconsin, and the balance from Panhandle, the petitioner herein.* The total estimated cost of the American Louisiana facilities exceeds $130,000,000, and the cost of the facilities proposed to be constructed by its affiliates exceeds $24,000,000.

[1] Emphasis added unless otherwise indicated.

"Panhandle, the petitioner herein, is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas within the purview of Section 15(a) of the Natural Gas Act. Panhandle produces and purchases large quantities of natural gas in Texas, Oklahoma and Kansas, and *owns and operates a main transmission pipeline system extending through the States of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio to Detroit, Michigan, enabling it to supply its markets with approximately* 970,000 Mcf of gas on days of maximum demand. Large volumes of gas are transported through petitioner's pipelines and *sold by petitioner to Michigan Consolidated for resale to consumers in the Cities of Detroit and Ann Arbor and their environs in Michigan. Petitioner's sales in the State of Michigan in 1953 amounted to about 35% of petitioner's entire sales. For the year ended June 30, 1953, petitioner sold 112,470,000 Mcf of gas in the State of Michigan from which it received revenue amounting to $33,042,000.* In addition, Panhandle sells to Texas Gas approximately 18,000 Mcf of gas per day.

"The operations in which Panhandle has been engaged, on and continuously since February 7, 1942 (the effective date of amendatory Section 7(c) of the Natural Gas Act), are carried on pursuant to the authorization of "grandfather" and "non-grandfather" certificates issued by the Commission. *The markets which Panhandle is authorized to continue to serve include the Detroit area to which American Louisiana proposes to deliver two-thirds of its gas."*

While further elaboration seems hardly required, Panhandle not only supplies 42% of Michigan Consolidated's requirements in Detroit, but also other substantial natural gas customers, both resale and direct, in the State of Michigan, to the extent that Panhandle's annual sales in the State of Michigan constitute 35% of its total sales, and account for over $33,000,000 of revenue. Moreover, Panhandle pioneered this market. The first invasion of the

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Detroit market was admittedly made by the American Natural Gas Company system through its subsidiary, Michigan Wisconsin Pipe line Company, and the second proposed invasion is now through its new subsidiary, American Louisiana Gas Company. The fact that Panhandle did not file a "competitive application" in the present proceeding, or that there is pending an abandonment proceeding to reduce its deliveries to Michigan Consolidated from 125,000 Mcf per day to 87,500 Mcf per day, does not affect its aggrieved status. Panhandle is *already* a competitor for the Detroit market, both resale and direct, as well as the Michigan market, and for present purposes, it does not make any difference whether the market of which Panhandle may be deprived is 125,000 Mcf or 87,500 Mcf per day.

Michigan Consolidated, a present customer of Panhandle, and a present customer of Michigan Wisconsin Pipe Line Company, is the principal proposed customer of American Louisiana Pipe Line Company and Michigan Consolidated Pipe Line Company, and a substantial proposed customer of Texas Gas Transmission Corporation through American Louisiana Pipe Line Company. Panhandle is therefore *now* a competitor of Michigan Consolidated Gas Company for direct sales in the Detroit area, and of American Louisiana Pipe Line Company, Michigan Wisconsin Pipe Line Company, and Texas Gas Transmission Corporation for resales to Michigan Consolidated Gas Company. Inasmuch as Panhandle presently has no contract with Michigan Consolidated, having only a Commission imposed obligation of 125,000 Mcf per day, Panhandle has no assurance that after completion of the American Louisiana line it will have any resale market in Detroit. The fact that the American Natural Gas system would apparently prefer to build a new subsidiary line without a showing of sufficient markets[2] and thus bring in much more expensive gas than to agree with Panhandle on a long-range solution of

[2] See Point 22 of Petition for Review, p. 12.

Michigan Consolidated's gas supply problem[3] confirms, rather than negatives, the threat of direct economic injury to Panhandle. Aside from the general threat to Panhandle's Michigan market of a third natural gas pipe line, with a presently proposed capacity of 300,000 Mcf per day and a designed capacity of 500,000 Mcf per day, it is only natural that Panhandle, the pioneer of the Detroit natural gas market, resist relegation to the status of a *temporary standby* for one of the subsidiaries of the American Natural Gas system (Michigan Consolidated) while another subsidiary (American Louisiana) completes a third natural gas pipe line to the Detroit area.

Borrowing from one of the prior proceedings apparently relied upon by Intervenor Movants, the Commission expressly found, in Docket G-669,[4] that Panhandle is "*entitled to reasonable protection in the service of these markets and to an opportunity to participate in their growth.*" Panhandle does not claim immunity from competition, but if that "reasonable protection" of markets does not include the right to insist that the certification of a third pipe line affiliated with the second, in competition for these markets, be in accordance with statutory standards and established precedents, then it simply does not mean anything.

2. *Contrary to assertions of the Intervenor Movants, the Petitioner has obviously not acquiesced in any "finding" by the Commission that Panhandle is not an aggrieved party*

In the first place, the Commission did not make any such finding. It is true that at page 18 of its opinion the Commission stated:

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[3] Panhandle's unsuccessful efforts to negotiate with Michigan Consolidated a long-range solution of the latter's gas supply problem, fully set forth in Panhandle's Intervention Petition, at pages 5-8, in FPC Docket G-2306, et al., are summarized in that portion of Panhandle's Rehearing Petition hereinafter quoted.

[4] *Michigan Wisconsin Pipe Line Company*, 5 FPC 953; affirmed, 169 F. 2d 881 (C.A. D.C. 1948).

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". . . We do not find, however, any proposal by Panhandle to meet additional needs of Michigan Consolidated or of the other customers of Michigan Wisconsin. *Accordingly,* we do not see wherein Panhandle may be aggrieved by the granting of a certificate to American Louisiana."

It is apparent that the majority of the Commission had the misconception that a competitive application was a prerequisite to aggrievement by an intervenor pipe line company. It is also apparent from pages 19, 20, and 21 of the Commission's opinion that the foregoing negative statement of lack of legal perception by the Commission majority was not made a part of the factual findings of the Commission. Even if any such finding had been attempted, it would have been a clear invasion of the province of review jurisdiction under Section 19(b) of the Natural Gas Act. Besides, express averment of aggrievement, not once but twice, in Panhandle's Review Petition at pages 6 and 7, as previously noted, hardly indicates acquiescence on the part of Panhandle in this misconception of the majority of the Commission.

And lastly, whatever this negative expression of the Commission majority be called, Panhandle's respects were fully paid to it in one whole section of Panhandle's Petition for Rehearing, as follows:

"XIII. *The Opinion's Treatment of the Intervenors Hardly Supplies the Admitted Deficiencies in the Record, and Provides no Escape from the Statutory Responsibilities of the Commission.*

"The Commission's gratuitous assertion, at page 18, that Panhandle is not aggrieved by the granting of a certificate to American Louisiana is rather revealing, because, of course, that issue was in no way before the Commission. That statement must have been intended as a response to the opening sentence of the dissenting opinion which states that, 'a certificate of convenience and necessity cannot lawfully be issued to American Louisiana on the existing record.' It may be that,

through an imperfection in the present statutes, a certificate which has been unlawfully issued is invulnerable to attack because the proceeding was uncontested and no party obtains review of the decision. But those circumstances, which clearly are not present here, would constitute no justification for the Commission to fail to comply with its statutory obligations.

"And in the present case, even if Panhandle and other intervenors had not participated in the proceeding, the absence of objecting parties surely would not justify the Commission in granting a certificate when the Commission itself recognizes that there is no gas supply whatever, no basis for determining the cost of service or rates, and no method of financing the project.

"The Commission's assertion that Panhandle is not an aggrieved party is apparently based upon the Commission's inability to find, 'any proposal by Panhandle to meet additional needs of Michigan Consolidated or of other customers of Michigan Wisconsin.' Of course, the simple answer is that Panhandle's interest in this proceeding is not so limited, as clearly shown by its Petition to Intervene, filed on January 11, 1954.

"That no competing application is presently on file with the Commission does not alter the fact that Panhandle is a competitor of each of the four applicants in this proceeding. As stated in Panhandle's Petition to Intervene:

> 'Panhandle has a substantial economic interest in each of these proceedings as a present and proposed supplier of natural gas in the principal markets sought to be served by means of the proposed facilities of the several applicants. It is a "competitor" of each of such applicants within the meaning of that term as used in Section 15 of the Natural Gas Act.
>
> "Michigan Consolidated, which engages in the distribution of gas in Detroit, Ann Arbor and other Michigan communities, presently purchases 127,000 Mcf of natural gas per day from Panhandle. This represents approximately 42 percent of Michigan Consolidated's total annual gas purchases, the re-

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maining 58 per cent being purchased from its affiliate, Michigan Wisconsin. Panhandle's sales to Michigan Consolidated in 1953 amounted to about 15 percent of Panhandle's entire sales. Panhandle also sells substantial volumes of gas to other distribution utilities in the state of Michigan, including Battle Creek Gas Company, Consumers Power Company, Michigan Gas Storage Company, Michigan Gas Utilities Company and Southeastern Michigan Gas Company. As of the year ended June 30, 1953, Panhandle sold 112,470,000 Mcf of gas in the state of Michigan (more than one-third of its total sales) from which it received revenues amounting to $33,042,000 (more than one-third of its entire revenues from sales). It is apparent, therefore, that Panhandle has very substantial interests in the area served by Michigan Consolidated and in other markets within reach of the proposed facilities involved in these proceedings.'

"Moreover, Panhandle is a supplier as well as a competitor of Texas Gas, which has been granted a certificate herein. There is presently pending in another proceeding an Examiner's Decision recommending that Panhandle be permitted to abandon service to Texas Gas pursuant to the termination of the contract between the parties. In addition, it has been the practice of the Commmission to impose upon Panhandle the obligation to supply deficiencies in the American Natural Gas System of which three of these applicants are members. In the light of all these facts, it is difficult to see how any intervenor could ever have a more vital interest than Panhandle has in these proceedings.

"Panhandle's vital interest herein has been recognized by the Commission on three separate occasions. In its order issued February 8, 1954, the Commission permitted Panhandle to intervene, although at the same time it denied the petition of another pipe line company. The other two instances constitute even stronger recognition by the Commission of Panhandle's interest in these proceedings, because in those two situations the applicants urged the Commission to exclude or limit Panhandle's participation *solely on the basis that Panhandle had not presented a competing*

application—the very ground upon which the Commission bases its assertion in Opinion 276. On both occasions the Commission denied the applicants' motions and Panhandle did continue actively to participate in every phase of the proceedings (Tr. 429-30; 2925).

"With the certificate granted to American Louisiana, the American Natural Gas holding company system seeks further to tighten its monopolistic control over a vital portion of Panhandle's market area. Panhandle does not concede that the efforts of the American Natural Gas system to establish this monopoly have been 100% successful. Panhandle still has a stake in the transmission of gas to the State of Michigan, and surely every incursion upon its rights is of vital concern to Panhandle. Moreover, while there is not presently pending before the Commission an application by Panhandle to serve the markets sought to be served by American Louisiana, this circumstance has been occasioned through no fault of Panhandle's. Panhandle has continuously and repeatedly expressed its willingness to negotiate with the American Natural Gas Company so as to provide a more dependable and far less expensive supply of gas to the Michigan and Wisconsin areas than can be otherwise achieved. Those efforts on the part of Panhandle to reach a solution have been repulsed by Michigan Consolidated despite the mandate of the Michigan Public Service Commission ordering Michigan Consolidated to continue such negotiations.

"The Commission must recognize that, no matter how great the willingness of a pipe line to supply natural gas to a given area, arrangements to provide such service cannot be consummated unless the distributor in that area wishes to accept the service. Of course, in the case of the American Natural Gas system, the long-standing, corporate policy has been to control completely the transmission and distribution of gas from the well-head to the burner tip. To accomplish this, the holding company organized Michigan Wisconsin, and has now created American Louisiana so as to *oust Panhandle from the market area* which it and it alone developed, and for which it holds a valid grandfather certificate.

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"Thus, the monopolistic program of the American Natural Gas System has precluded the filing by Panhandle of a 'competing' application because the subsidiaries of that system are unwilling to purchase Panhandle's gas except on their terms of preempting wholesale markets in an area for which they do not even hold a franchise. This restraint has cost consumers in the Detroit area millions of dollars annually, as demonstrated by the wide disparity in rates charged by the respective transmission lines.

"There is no incentive for the American Natural distributors to cooperate with Panhandle when they are assured that the Commission will force Panhandle to supply their demands until such time as they are prepared to propose a new transmission line, and then be assured again that the Commission will promptly approve such proposal, regardless of economics. But to say that Panhandle is 'not aggrieved' by the Commission's approval of a new competitor, merely because the affiliates of that competitor have refused to purchase their requirements from Panhandle except as a standby facility, is to overlook the very root of the problem.

"It is perfectly apparent that the American Louisiana project does not provide a feasible solution to the problems confronting the Michigan and Wisconsin market areas. Panhandle is willing to explore further with the interested parties the manner in which a workable solution may be reached. However, the issuance by the Commission of the certificates authorized by Opinion No. 276 constitutes an impediment to any successful resolution of those problems.

"Panhandle submits that the medium suggested above affords far greater possibilities of success than the procedure presently being adopted by the Commission, namely, premature issuance of conditional certificates without adequate evidence or findings, apparently on the mistaken theory that the absence of a competitive application insulates against successful attack on appeal."

In the light of all the foregoing, to say that Panhandle is not aggrieved, or that it has not claimed or shown aggrieve-

ment, or that it has failed to challenge a "finding" of non-aggrievement, is simply to ignore the plain facts of record.

WHEREFORE Panhandle respectfully prays that the pending motions to dismiss its Review Petition be promptly denied.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued February 7, 1955

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed February 25, 1955)

By McLAUGHLIN, *Circuit Judge.*

These are motions by the respondent and interveners to dismiss the petition for review of the Commission's opinion #276 and accompanying order of October 1, 1954 which issued certificates of convenience and necessity to American Louisiana Pipe Line Company and Texas Gas Transmission Company. Under the opinion and order American Louisiana was authorized to construct a pipeline system from points in Louisiana to points within the State of Michigan. The line would have an initial delivery capacity of approximately 300,000 Mcf of natural gas per day. The same opinion and order gave Texas Gas authority to construct facilities which would enable it to deliver 51,000 Mcf of natural gas per day to American Louisiana at a proposed connecting point with the latter's system in Kentucky. American Louisiana proposes to deliver 200,000 Mcf per day of its initial capacity to Michigan

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Consolidated Gas Company and the remaining 100,000 Mcf to Michigan Wisconsin Pipe Line Company.[1] That gas would be added to the present supplies of those companies and sold and resold in their respective territories which cover in part the states of Iowa, Missouri, Wisconsin and Michigan.

The petitioner, Panhandle, is a pipeline owner and operator but, with the exception of Michigan Consolidated, does not serve any of the distributing companies or communities which will receive gas from American Louisiana. Panhandle was permitted to intervene in the proceeding below by the Commission and, as has been indicated, filed in this court its petition to review the Commission's above described opinion and order.

The fact that Panhandle was allowed to intervene of itself "shall not be construed as recognition by the Commission that such intervener might be aggrieved by any order of the Commission in such proceeding." F.P.C. Rules of Practice and Procedure, 18 C.F.R. Section 1.1(f)(13). Under Section 19(b) of the Act[2] petitioner must be "aggrieved by an order issued by the Commission" to entitle it to seek review of the order.

Panhandle maintains that in its petition for review it expressly alleges and shows that it is an aggrieved party. In two places of that petition it does state flatly that it is aggrieved by the order and opinion. However in its detailed exposition of the situation about which it complains no factual allegations are given which support the contention that it is aggrieved. The naked assertion is not enough. Interstate Electric v. Federal Power Commission, 164 F.2d 485 (C.A. 9, 1947); United States Cane Sugar Refiners' Ass'n. v. McNutt, 138 F.2d 116 (C.A. 2, 1943); Pittsburgh Radio Supply House v. Federal Communica-

[1] The applications of Michigan Wisconsin and Michigan Consolidated to enable them to receive and deliver such gas were, by the order of the Commission under review, expressly reserved for further disposition.

[2] 15 U.S.C. Section 717r(b).

tions Commission, 98 F.2d 303 (C.A.D.C., 1938); cf. National Coal Ass'n. v. Federal Power Commission, 191 F.2d 462 (C.A.D.C., 1951); National Broadcasting Co. v. Federal Communications Commission, 132 F.2d 545 (C.A.D.C., 1942), affirmed 319 U.S. 238 (1943).

Panhandle says it is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas. Whether or not it is a competitor of these companies for the present restricted market in the states of Michigan and Wisconsin is beside the point. There exists in that area "a crying demand" for additional quantities of gas. This can hardly be disputed.[3] American Louisiana and Texas Gas propose to build a pipeline in order to supply that demand. Panhandle filed no competitive application in this proceding. It has evinced no interest in trying to take care of the substantial increased needs which are the basis for the certificates of convenience and necessity issued by the Commission.

The only gas supplied by Panhandle to any of the distributing companies who will obtain gas from the American Louisiana project is to Michigan Consolidated. Panhandle, however, has been actually seeking to reduce the quantity of gas it furnishes Michigan Consolidated. The Commission denied its application to this effect. On review we remanded the case to the Commission for reconsideration of Panhandle's application. Panhandle Eastern Pipe Line

[3] The Commission stated in its opinion:

"* * * the present supply available for resale from all sources aggregates 156,950,000 Mcf annually. There can be no question but that this quantity is clearly inadequate; not only has this Commission found it necessary to restrict the growth of the load through the tariff of Michigan Wisconsin, but the Michigan and Wisconsin Commissions have found it necessary to impose stringent restrictions on the growth of load in their respective jurisdictions. * * *

"* * * It appears from the uncontradicted evidence in these proceedings that there is a crying demand for additional quantities of natural gas in the Michigan-Wisconsin area, which, if not satisfied by the American Louisiana project, may not be satisfied for a considerable period of time."

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Co. v. Federal Power Commission, 204 F.2d 925 (C.A. 3, 1953).[4] That proceeding which has been combined with Panhandle's application for equitable distribution of its capacity among customers (Commission order of February 18, 1954, 19 Fed. Reg. 1071-73) has been heard and is awaiting decision. Whatever may be the outcome of Panhandle's effort to obtain authority for reduction of its supply of gas to Michigan Consolidated, the gas to be delivered to that concern by American Louisiana is not in displacement of any part of its Panhandle allotment but over and above it in order to provide for the increased requirements of the Michigan Consolidated territory.[5]

Panhandle makes no offer of facts in its petition for review that would even tend to support any allegation that it is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas for the unsupplied market. It participated fully in the exhaustive hearings and arguments below. Thereafter the Commission found:

> "Panhandle Eastern Pipe Line Company, which company also serves Michigan Consolidated, has intervened in opposition to the granting of the application,

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[4] See also Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 204 F. 2d 675 (C.A. 3, 1953); Michigan Consolidated Gas Co. v. Federal Power Commission, 203 F. 2d 895 (C.A. 3, 1953); Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949).

[5] Without any factual allegation in the petition, Panhandle contends that if the proposed pipeline were constructed Michigan Consolidated might eventually purchase all its supply from American Louisiana. There is nothing before us giving the slightest support to the suggestion that Michigan Consolidated is not bound to accept its quota of gas from Panhandle; certainly no implication that it could refuse delivery from Panhandle without the authority of the Commission. Beyond that the case is barren of proof that Michigan Consolidated will attempt to cut off Panhandle as a supplier. The threat of injury contemplated by the Act "must be something more than * * * highly speculative." National Broadcasting Co. v. Federal Communications Commission, supra at p. 548. See United States Cane Sugar Refiners' Ass'n. v. McNutt, supra.

alleging competition. We do not find, however, any proposal by Panhandle to meet additional needs of Michigan Consolidated or of the other customers of Michigan Wisconsin. Accordingly, we do not see wherein Panhandle may be aggrieved by the granting of a certificate to American Louisiana."

We are entirely satisfied that on the facts the above findings of the Commission were justified.

In addition to the unwarranted allegation of competition, Panhandle alleges that it "sells to Texas Gas approximately 18,000 Mcf of gas per day" and that "there is presently pending before the Commission a decision of one of its Trial Examiners permitting Panhandle to discontinue this service." We are not informed by the petition how Panhandle is aggrieved in this regard, nor is any aggrievement perceptible. Panhandle intimates that despite its wish to end its gas deliveries to Texas it might be forced to continue them so that Texas may meet its obligation of 51,000 Mcf per day to American Louisiana. The order of the Commission contains no such provision expressly or impliedly.

The petition for review will be dismissed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 11,484

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*.

Order

Upon consideration of the motions by respondent and intervenors to dismiss the petition for review in the above-entitled case, the joinders by intervenors in the motions, and of the answer of petitioner; and after hearing:

It is ORDERED that the petition for review be, and it is hereby dismissed.

Attest:

IDA O. CRESKOFF
Clerk

February 25, 1955

PETITION FOR REHEARING

To the United States Court of Appeals for the Third Circuit and the Honorable Judges thereof:

Panhandle Eastern Pipe Line Company[1] petitions this Honorable Court for rehearing of its Opinion and Order, filed February 25, 1955, dismissing Panhandle's Petition for Review.

[1] Hereinafter sometimes called "Panhandle" or "petitioner."

Basis Upon Which Rehearing Is Sought

On December 8, 1954, Panhandle Eastern Pipe Line Company petitioned this Honorable Court to review and set aside the Federal Power Commission's Opinion No. 276 and accompanying order, issued October 1, 1954, purporting to grant approval to American Louisiana Pipe Line Company and Texas Gas Transmission Corporation to develop a large additional pipe line to the states of Michigan and Wisconsin.

The Respondent, Federal Power Commission, and the applicants filed motions to dismiss, which Panhandle opposed in its Answer, filed January 31, 1955. The motions were argued on February 7, 1955, and, on February 25, this Honorable Court entered its order dismissing Panhandle's Petition to Review.

Pursuant to Rule 33, Panhandle respectfully requests that this Honorable Court grant rehearing herein in the light of subsequent developments, as well as matters previously presented but not considered in the Court's Opinion, which demonstrate fully that Panhandle is an "aggrieved" party, within the purview of Section 19(b) of the Natural Gas Act, and entitled to maintain this review proceding. In addition, Panhandle respectfully submits that this Honorable Court did not accept as true the facts alleged in Panhandle's Petition to Review although motions to dismiss must necessarily be considered to admit the truth of such allegations. Moreover, this Honorable Court treated Panhandle's allegation of competitive position as being restricted to sales for resale, although Panhandle's Petition for Review is not so limited inasmuch as Panhandle is also a competitor of the applicants with respect to direct sales to industry. Panhandle also believes that its aggrievement by reason of the certificate granted to Texas Gas entitles Panhandle to maintain this review proceeding and that, here again, this Honorable Court failed to accept as true the factual allegations of Panhandle's Petition to Review.

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I. The Complete Exemption of Michigan Consolidated Gas Company from Commission Jurisdiction Demonstrates Further Panhandle's Status as an Aggrieved Party

Panhandle has consistently urged that it is a competitor of American Louisiana, and that it is aggrieved by the granting of a certificate to American Louisiana which will enable that proposed large pipe line to invade Panhandle's market in Detroit. Such competition is not limited to the "unsupplied market" discussed in the Court's Opinion, but is even more clearly present with respect to Panhandle's existing market which includes very substantial sales to Michigan Consolidated in Detroit.

Inasmuch as there is not sufficient market in the Detroit area to absorb the 200,000 Mcf per day which American Louisiana proposes to deliver to Michigan Consolidated at that point,[2] Panhandle is immediately threatened with the loss of its existing market, as soon as the new pipe line project commences operation.

The Court's Opinion states that there is nothing to indicate that "Michigan Consolidated is not bound to accept its quota of gas from Panhandle"; the Opinion further states:

> "Certainly no implication that it could refuse delivery from Panhandle without the authority of the Commission."

However, events which were occurring simultaneously, but which were unknown to Panhandle and could therefore not be brought to the Court's attention, show that the threat of loss of existing markets is far clearer than the Court assumed, and further demonstrate Panhandle's aggrieved status.

On February 7, 1955, the very day upon which the Court heard argument on the motions to dismiss, the Federal Power Commission released the news that by order adopted

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[2] Point No. 9 at p. 9 of Petition for Review, and Point No. 22 at p. 12 of Petition for Review.

February 2, and issued February 3, in F.P.C. Docket No. G-6507, it had declared Michigan Consolidated to be entirely exempt from any orders of the Commission.[3] Panhandle, as well as the general public, did not know of this very recent action and it was not brought to the Court's attention when this general subject was discussed by the various parties in oral argument.

Panhandle submits that the exemption order completely refutes the argument that Panhandle is not threatened by the loss of its existing market to Michigan Consolidated. This Court is fully aware that Michigan Consolidated is not contractually bound to accept any deliveries whatever from Panhandle, since no contract exists between the parties. Deliveries are being made only pursuant to an order of the Federal Power Commission which directs Panhandle to continue that service for an indefinite period, but which does not even purport to impose a reciprocal obligation upon Michigan Consolidated.

Both Panhandle and Michigan Consolidated appealed to this Court from the Commission's order above referred to, and those cases are relied upon by the Court in its Opinion granting the motions to dismiss herein.[4] The Court was evidently of the view that even in the absence of any contractual obligation on the part of Michigan Consolidated, Panhandle would be protected from that company's refusal to accept deliveries because Commission authority could maintain such deliveries. The Commission has now made it absolutely clear that no such protection exists. Indeed, the operative portion of its order of February 3, 1955, states categorically:[5]

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[3] The "Declaration of Exemption" is set forth in the Appendix hereto. See Federal Register for March 3, 1955, 20 F.R. 1328.

[4] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 675 (C.A. 3, 1953); *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 203 F. 2d 895 (C.A. 3, 1953).

[5] "Declaration of Exemption," *In the Matter of Michigan Consolidated Gas Company*, Docket No. G-6507, set forth in the Appendix hereto.

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"Michigan Consolidated Gas Company is *exempt* from the *provisions of the Natural Gas Act,* and the *orders, rules and regulations of this Commission* issued pursuant thereto."

Although back in 1946 the Commission, in certificating Michigan Wisconsin Pipe Line Company, expressly held that Panhandle "is entitled to reasonable protection in the service of these markets"[6] it is obvious that the Commission *has not* granted any such protection in the present American Louisiana proceeding, and now it recognizes it legally *cannot* do so. When this fact is considered in the light of the fact that there is no need for a pipe line of the size proposed to be constructed by American Louisiana, Panhandle submits that the threat posed by the new competitor is not "speculative," but very real indeed.

As this Court is fully aware, relations between Panhandle and the American Natural Gas holding company system have been bitter for many years. Ever since American Natural attempted to take over Panhandle and, failing in that, attempted to drive Panhandle out of the direct and resale market in the Detroit area, there has been continual discord. In addition to this case, and the four cases cited in the Court's opinion, these parties have been involved in at least 10 other court actions arising out of the struggle for the Detroit market.[7] In the light of this history, Pan-

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[6] *Michigan Wisconsin Pipe Line Company,* 5 FPC 953; affirmed 169 F. 2d 881 (C.A. D.C., 1948).

[7] (1) *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* (C.A. 3, 1955) No. 11,510, filed January 6, 1955.

(2) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.,* (C.A. 6, 1955) No. 12,200, argued February 4, 1955; appeal from 117 F. Supp. 551 (E.D. Mich., 1953).

(3) *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* (C.A. 6) No. 12,201, argued February 4, 1955; appeal from 117 F. Supp. 551 (E.D. Mich., 1953).

(4) *Michigan Consolidated Gas Co.* v. *Michigan Public Service Commission,* (Circuit Court, Ingham County) No. 36,297, filed January, 1955.

handle submits that it is manifest that Michigan Consolidated will cut off its purchases from Panhandle, totally or partially, just as soon as American Louisiana can be placed in operation.

Michigan Consolidated will then have two large 100 per cent affiliated pipeline suppliers. With idle capacity in one or both of those sister companies, and the Federal Power Commission powerless to enforce any orders upon Michigan Consolidated, Panhandle's prospects are altogether clear. And, of course, the threat is present whether Panhandle's deliveries are 127,000 Mcf per day or only 87,500 Mcf per day. We submit that to deny Panhandle's status as an aggrieved party, particularly in the light of the recent Declaration of Exemption, would be to overlook the very purpose for which American Natural refused to negotiate with Panhandle for additional supplies and, instead, embarked upon this new project.

In this connection, Panhandle respectfully submits that for the purpose of deciding the motions to dismiss, the factual allegations in Panhandle's Petition to Review must be accepted as true. Panhandle expressly asserted in Point No. 9, that there was no substantial evidence "that American Louisiana's affiliates [Michigan Consolidated] have an *adequate market* for the gas . . ." In addition, Point No. 22 challenges "the availability of *sufficient markets to absorb the volumes of gas* contemplated by the certificate."

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(5) *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951).

(6) *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Company*, 173 F. 2d 784 (C.A. 6, 1949).

(7) *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F. 2d 942 (C.A. 6, 1949).

(8) *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (C.A. D.C., 1948).

(9) *Panhandle Eastern Pipe Line Co.* v. *Securities & Exchange Commission*, 170 F. 2d 453 (C.A. 8, 1948).

(10) *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 167 F. 2d 264 (C.A. D.C. 1948).

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There was no evidence whatever before the Court upon which it could base a finding that there is a "crying need" for American Louisiana's gas, but, even if that were true, it is impossible at this stage of the proceedings to controvert Panhandle's allegation that the need for additional gas is insufficient to warrant a pipe line with a capacity of 300,000 Mcf per day. The threat to Panhandle must be evaluated on the assumption that there will be excess capacity in American Louisiana's pipe line.

It is a well-established rule of law that motions to dismiss admit the factual allegations made by the party seeking review. *Aluminum Company of America* v. *Federal Power Commission,* 130 F. 2d 445, 446 (C.A. D.C., 1942); *National Coal Association* v. *Federal Power Commission,* 191 F. 2d 462, 466 (C.A. D.C., 1951); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 699 (C.A. 2, 1943).

The principle is well stated in *Philadelphia Co.* v. *Securities and Exchange Commission,* 164 F. 2d 889, 890 (C.A. D.C., 1947), *cert. denied,* 333 U.S. 828, as follows:

> ". . . The relevant facts are either alleged in the petition for review and admitted, for the purpose thereof, by the motion to dismiss . . . or as stated in the brief of Philadelphia and treated as true, or not denied, in the brief of the Commission."

See also, *Pollack* v. *Public Utilities Commission,* 191 F. 2d 450, 454 (C.A. D.C., 1951), reversed on other grounds, 343 U.S. 451; *Yankee Network* v. *Federal Communications Commission,* 107 F. 2d 212, 224 (C.A. D.C., 1939).

As more fully shown in Panhandle's answer to the motions to dismiss, Panhandle specifically alleged that it is a competitor of the parties which were granted certificates (including American Louisiana), the extent and dollar amount of its present interest which is subject to threatened loss,[8] and that *the market will not absorb the capacity of the proposed new competitor.* These facts

[8] Petition for Review, pp. 3-4.

show that the threat is not limited to the "unsupplied market" and that Panhandle is even more clearly "aggrieved" with respect to its existing market.

II. Panhandle Is a Competitor for Direct Sales to Industry as Well as for the Resale Market

The Court's Opinion deals only with resale markets in determining whether Panhandle is a competitor aggrieved by the grant of certificates to the intervenors. However, Panhandle is also an active competitor for direct sales to industry, and its effort to obtain review is not in any way restricted to its aggrievement relating to the resale market.

At the argument, as well as in its answer to the motions to dismiss, Panhandle sought to bring to the Court's attention the impact which the creation of this proposed project would have upon Panhandle's competitive position in the market for industrial sales.

Moreover, in oral argument, the movants themselves cited to the Court a specific instance which we submit clearly shows the direct threat which is aimed at Panhandle's direct sales business by reason of the granting of a certificate to American Louisiana. The situation to which the movants referred, in their effort to show that Panhandle is unwilling to sell gas to Michigan Consolidated, is Panhandle's proposed sale to McLouth Steel Corporation for use in a new plant now being built in Brownstown Township, Wayne County, Michigan. Michigan Consolidated presently sells gas to domestic consumers but not to industry in that area.

Several months ago, Panhandle applied to the Michigan Public Service Commission for a certificate authorizing Panhandle to sell gas directly to McLouth Steel. Michigan Consolidated has itself attempted to take over this customer, but, under orders of the Michigan Commission it has not been permitted to sell gas on an interruptible basis to large new industrial customers. Nevertheless, Michigan Consolidated has vigorously opposed the granting of a certificate to Panhandle, both before the Michigan

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Commission and in the public press. It has sought to assure the Michigan authorities that its supplies from American Louisiana would insure its ability to serve the plant, so that Panhandle's application should therefore be denied.

Indeed, only four days after argument was held on these motions to dismiss, Michigan Consolidated argued in the Circuit Court for Ingham County, Michigan, its motion for an injunction prohibiting the Michigan Public Service Commission from granting a certificate to Panhandle to commence selling gas to McLouth Steel. In its Bill of Complaint before the Michigan court, Michigan Consolidated expressly relied upon the American Louisiana project, stating, among other things:

> "The availability of *this large additional supply of natural gas* to Michigan Consolidated upon the construction of the pipe line *materially affects* the issues in the McLouth proceedings and should be considered by the defendant in reaching a determination on Panhandle's application."

Not only did Michigan Consolidated base its Complaint upon the American Louisiana project, but also in its brief, filed with the Michigan court on February 25, 1955, Michigan Consolidated stated its position even more categorically, as follows:

> "The evidence received by the Defendant Commission showed that there was then pending before the Federal Power Commission a proceeding for the issuance of a certificate of convenience and necessity for the construction of a new pipe line to transport natural gas from the natural gas fields of Louisiana to Detroit and that Michigan Consolidated had entered into a contract with the corporation which would own and operate such pipe line for the delivery of approximately 200,000,000 cubic feet of gas per day to Michigan Consolidated at Detroit. It also showed that *the receipt of such new supply of gas would enable Michigan Consolidated to fully meet all of the natural*

> *gas requirements of customers located in its market areas, including such customers as McLouth Steel Corporation.* The 'new evidence' which Michigan Consolidated seeks to introduce in said proceedings includes evidence to show that, on October 1, 1954, the Federal Power Commission entered an order for the issuance of a certificate of convenience and necessity for the construction of such new pipe line." (Emphasis supplied)

These are not mere assertions by Panhandle, or "speculative" possibilities of detriment which may ensue to Panhandle's competitive position for direct sales upon the commencement of operations by American Louisiana. Instead, Michigan Consolidated itself is making these unqualified representations to a state court in Michigan in order to prevent Panhandle from serving a new industrial customer. In the light of Michigan Consolidated's own position in this matter, how can it be said that Panhandle is not adversely affected by the American Louisiana project?

Accordingly, Panhandle respectfully submits that the Court should have considered the competition for direct sales as well as competition for the resale market. Such consideration would, we believe, clearly show that Panhandle is aggrieved by the Commission's order granting a certificate to American Louisiana and is entitled to court review of that order pursuant to Section 19(b) of the Natural Gas Act.

III. Panhandle Is Aggrieved Also by the Certificate Granted to Texas Gas

In its Opinion dismissing Panhandle's Petition to Intervene, this Honorable Court stated that it had not been informed of the manner in which Panhandle is aggrieved by the Commission's granting of a certificate to Texas Gas Transmission Corporation. The facts showing such aggrievement are, however, set forth in Panhandle's Petition to Review, and we submit that consideration of those facts warrants rehearing in this case.

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Panhandle sells to Texas Gas 18,000 Mcf of natural gas per day pursuant to a contract which expired in 1953. Panhandle does not wish to continue sales to Texas Gas, because Panhandle has other markets which constitute its primary obligation. Texas Gas has resisted all efforts to terminate this service on the basis of its own lack of supply.

Point 28 of Panhandle's Petition to Review specifically alleges that Texas Gas does not have sufficient gas reserves to permit the sale to American Louisiana,[9] and Point 26 specifically alleges that Texas Gas is relying upon the continuation of deliveries of 18,000 Mcf per day from Panhandle.[10] Those allegations have not been denied and, in any event, they must be accepted as true for purposes of the motions to dismiss.

Since Section 7(b) of the Natural Gas Act requires a finding that the public convenience and necessity permit the abandonment of service, it is obvious that the dedication to American Louisiana of a large portion of Texas Gas's already inadequate gas reserves, directly threatens Panhandle with the requirement that it continue, against its will, the sales to Texas Gas. This is a substantial threat which adversely affects Panhandle and its existence should not be disregarded simply because the Commission did not spell it out in granting the present certificate to Texas Gas. As a matter of fact, when it granted the certificate to Texas Gas, the Commission itself stated that "Texas Gas has not completely answered the questions raised on the record as to its showing of gas reserves,"[11] and further that, even under Texas Gas's plans, it "will be required to obtain additional supplies of gas."[12]

Such findings by the Commission are more than a mere implication that Panhandle may be forced to continue to

[9] Petition for Review, p. 13.
[10] Petition for Review, p. 13.
[11] Petition for Review, Appendix, p. 12.
[12] Petition for Review, Appendix, p. 11.

supply this 18,000 Mcf to Texas Gas. We submit that if the Court had accepted as true the facts alleged as to the inadequacy of Texas Gas' reserves, Panhandle's aggrievement in this regard would have been clearly perceptible.

Moreover, as discussed more fully in the preceding sections of this Petition, Panhandle is vitally interested in retaining both a resale market and a direct market for gas in the Detroit area. The American Louisiana project threatens immediate loss of part or all of that market. American Louisiana concededly could not invade Panhandle's Detroit market without relying upon Texas Gas, and yet, by doing so, it is Panhandle's own gas which is proposed to be used to damage or eliminate Panhandle's competitive position in that area.

CONCLUSION

Wherefore, Panhandle prays that this Honorable Court grant rehearing on its Opinion and Order dismissing Panhandle's Petition to Review and vacate such Order.

In the Matter of
MICHIGAN CONSOLIDATED GAS COMPANY

Declaration of Exemption

Michigan Consolidated Gas Company (Applicant) filed an application on December 27, 1954, for exemption from the provisions of the Natural Gas Act pursuant to Section 1 (c) thereof.

Upon the basis of the application filed, the exhibits appended thereto, and the files of the Commission, it appears that:

(1) Applicant is a Michigan corporation, engaged in producing, purchasing, transporting, distributing and selling natural gas in the State of Michigan;

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(2) Applicant purchases interstate natural gas from Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company at delivery points all within the State of Michigan;

(3) All natural gas so received by Applicant is ultimately consumed within the State of Michigan, and all of Applicant's facilities are located within the said State; and

(4) The Michigan Public Service Commission has certified to the Federal Power Commission that it has and is exercising regulatory jurisdiction over the rates, service and facilities of Applicant.

Wherefore, the Commission *declares,* by reason of the foregoing:

Michigan Consolidated Gas Company is exempt from the provisions of the Natural Gas Act, and the orders, rules and regulations of this Commission issued pursuant thereto.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: February 2, 1955
Issued: February 3, 1955

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,484

PANHANDLE EASTERN PIPE LINE COMPANY, a Corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

Order

Present: McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

The petition for rehearing in this case is hereby denied.

By the Court,

McLAUGHLIN
Circuit Judge.

March 21, 1955.

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(Corrected Copy)

FILED
MAY 20 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY,
A Corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM E. MILLER
1100 Shoreham Building
Washington 5, D. C.
Counsel for Petitioner

Of Counsel
STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

I.

The petition for certiorari included a number of legal questions, all substantial and all related to the question of Panhandle's aggrievement. Nowhere in either the Brief of the Respondent in Opposition or the briefs filed by the intervenors, is any light shed on the legal problems raised in the petition. Both the respondent and the intervenors

ply this Court with a series of arguments assuming the answers to the questions presented; they seek to obscure the nature of the case by characterizing Panhandle as an obstructionist without a legal grievance seeking a baseless judicial review.[1] The intervenors blandly assume the existence of a sufficient market to absorb the quantities of gas which American Louisiana is authorized to transport. The respondent, likewise avoiding the questions presented, attempts to prove the existence of an adequate market to support the new pipe line by reference to previous litigation and to the findings made by the Commission therein.

No one suggests that the court below had any evidence before it as to the adequacy of the market other than the history of prior litigation, and Panhandle submits that this is clearly insufficient to prove the present market needs.[2] Moreover, the proceedings that are mentioned, other than one which took place nine years ago, have nothing whatsoever to do with the existence of a market sufficient to support deliveries of 300,000 additional Mcf daily. This Court is faced with the fact that the Commission has authorized the initial delivery by American Louisiana of 300,000 Mcf of gas daily or 111,946,000 Mcf yearly. (App. 33) To rely on the prior history is to demonstrate conclusively the validity of Panhandle's position that there is not a sufficient market. The figures cited by the respondent[3] show that the Commission's estimate of the total Detroit requirements in 1952 would be but 87,000,000 Mcf. But the volumes in this case result in annual deliveries to Mich-

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[1] American Louisiana et al., Brief in Opposition, p. 7.

[2] No doubt, a court may take judicial notice of a prior record. *United States* v. *Pink*, 315 U.S. 203, 217. But, the prior records should not be held to cure a deficiency in the record in this case, especially where the Commission recognized the necessity of taking evidence on the market issue and did not even purport to rely on prior records.

[3] Respondent's Brief in Opposition, p. 5.

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igan Consolidated in Detroit in excess of ~~140,000,000~~ Mcf.[4] Obviously a requirement of 87,000,000 Mcf does not support a delivery or take of ~~140,000,000~~ Mcf. Certainly the prior history is of no value to any court in ascertaining the existence of a present market sufficient to sustain American Louisiana's certificate of convenience and necessity to transport the amounts in question here.

There has been a lot of loose talk in the briefs before this Court about the need for "additional" gas in the area but not one word about the price of this gas. Aside from the fact that there is no evidence before the Court of this need, the respondent and the intervenors fail to mention the fact that the probable market cannot be determined in a vacuum without relation to the price at which the gas can be delivered. To be sure, there may be a sizable demand for any desirable commodity at a price commensurate with the ability and willingness of people to pay but the extent of that demand must depend upon the price at which the commodity will have to be sold. The Commission itself concedes that it is "impossible" to determine "what the American Louisiana cost of service, and its rates, may be".[5] As the dissenting Commissioners cogently observed, the available market depends on whether "the price is low enough".[6] They continued:

> "It is impossible to determine, at this time, what prices are necessary to make the project feasible, and whether those prices would be competitive with other fuels."

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[4] American Louisiana proposes to sell and Michigan Consolidated proposes to purchase 200,000 Mcf of gas daily. This amounts to 73,000,000 Mcf annually. Panhandle presently delivers to Michigan Consolidated ~~32,000,000~~ Mcf of gas annually and this is 42% of Michigan Consolidated's present gas requirements, which amount to over ~~76,000,000~~ Mcf annually. Thus, the proposed deliveries to Michigan Consolidated will ~~almost double~~ the amount of gas it has available.

[5] App. 23.

[6] App. 38; see also, App. 39.

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Yet the Commission made no finding as to the price which American Louisiana and its affiliates will be required to charge in order to recover their costs. Those costs include "producers' prices, as shown in their contracts, which are among the highest, if not the highest, known to this Commission."[7] The minimum rate proposed by American Louisiana is about 80% higher than the cost of existing supplies to Michigan Consolidated and the number of potential customers will unquestionably be severely limited by the price which will have to be charged. It is therefore abundantly clear that the abstract volume which could be disposed of on the basis of present rates in the area, cannot be used interchangeably with the market which will actually be available.

No one disputes that the existence *vel non* of sufficient market is critical so far as Panhandle's aggrieved status is concerned. Intervenors' willingness to assume its existence in the face of the petition and respondent's attempt to prove it by evidence *dehors* the record demonstrates the point here made. But neither can obscure the fact that the court below had no evidence in this case before it; that the Commission did take evidence on the sufficiency of the market and made findings thereon; that the prior records in no way support the authorization of 300,000 Mcf of gas to the market area involved; and that in the absence of substantial evidence supporting such an authorization the Commission's order is arbitrary.

Respondent and intervenors play a game combining the elements of tag and blind man's buff. As "it", the Court must try to catch a market which it is often assured exists but cannot find in anything shown to it. The unfairness of this game to both the Court and to the petitioner is well illustrated in Respondent's Brief[8] where, after going to great lengths to convince this Court that the court below

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[7] App. 38.

[8] Respondent's Brief in Opposition, p. 19, n. 13.

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was "clearly justified in bringing to bear its experience and on that basis to recognize the crying demand for natural gas in this area", the respondent states "*The evidence in the administrative record fully supports this* [sufficiency of market] *conclusion.*" (Emphasis supplied.) Thus, not only is the Court asked to accept an unsupported statement of the intervenors, previous cases not at all germane to this one, and the "experience" of the court below, but also it is assured that the administrative record in this case supports everybody—except the petitioner, whose contrary allegations in this regard were legally admitted by motions to dismiss in the court below.

II.

To suggest, as does the respondent,[9] that Panhandle has not made sufficient averments that no unsatisfied demand exists is hardly fair. There can be no doubt that Panhandle's petition challenges the sufficiency of the market to absorb the new volumes. To require Panhandle at this stage of a proceeding for review to prove "that *no* unsatisfied demand exists" (emphasis supplied) has the same effect as allowing a court to rubber stamp a Commission finding in order to bar review. No petitioner could sustain that burden; and, to make an averment to that effect would amount to pure conjecture. The question is not whether there is any additional market but rather the sufficiency of such market. As a party whose interests are involved in a case before the Commission, Panhandle is entitled to require the Commission to make findings based on substantial evidence; and whether its allegations on review are cast in positive or negative terms is of small moment. If there is no substantial evidence supporting the *sufficiency* of a market insofar as a certificate of convenience and necessity is concerned, the market is *insufficient*. The Commission cannot shift to a review petitioner the responsi-

[9] Respondent's Brief in Opposition, p. 18.

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bility for negating the facts which the applicant is required to prove and the Commission is required to find.

Quite apart from their obvious lack of heart to contest the legal arguments advanced by Panhandle and their willingness to assume favorable answers to the underlying market question, the respondent and the intervenors attempt to rewrite the review statutes. It is asserted[10] that Congress *limited* judicial review of Commission orders by the aggrieved party statutes. To the contrary, it seems clear that this is definitely not the case. As is shown in the petition[11] this Court and the lower courts have construed these statutes as broadening the right to obtain review. Even consumers are now held to be aggrieved parties.

Virtually all the cases cited for the proposition that Panhandle's allegations in the petition for review were insufficient were decided prior to *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and are distinguishable on that ground. Review of these cases would serve little purpose for they were decided in a climate of uncertainty at a time when the problem of who was an aggrieved party was thoroughly confused with the question of whether the party seeking review had specifically alleged errors which interfered with a legally protected interest of his own. See *Great Western Broadcasting Ass'n* v. *Federal Communications Commission*, D. C. Cir., 94 F. 2d 244, 248. In *Reade* v. *Ewing*, 2d Cir., 205 F. 2d 630, 631, 632, where the petitioner was held to have standing as a consumer to obtain review, it was simply alleged that:

> " . . . your petitioner and the members of his family are consumers and prospective consumers of oleomargarine and the inclusion of any harmful ingredient therein which will make or which may make the oleo-

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[10] Respondent's Brief in Opposition, p. 13; American Louisiana et al., Brief in Opposition, p. 7.

[11] Petition for Writ of Certiorari, pp. 11-17.

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> margarine unwholesome and detrimental to the health of a human being, will adversely affect and harm petitioner and the members of his family."

The basis of his consumer allegation was stated by the court to be that the agency order was "not supported by sufficient evidence to show that it 'will promote honestly [sic] and fair dealing in the interest of consumers.' "

Even though the court found against the petitioner on the merits, it upheld the petitioner's standing to obtain review as a consumer and said:

> "... Congress, by authorizing certain persons within a described class—here those 'adversely affected'—to bring actions to restrain such officers from transcending their statutory authority, validly creates a class of 'private Attorney Generals' to vindicate the right of the United States against its wrongdoing officer."

Respondent also asserts that Panhandle's allegations that there was no substantial evidence of the adequacy of the markets is not an allegation that the markets are insufficient. Respondent does concede, however, that these allegations are to be considered by the Court.[12] Allegations as to absence of evidence to support the existence of a market cannot be turned into proof that it does exist; nor, can Panhandle's allegations be properly or fairly construed in any way other than that the market is not sufficient.

III.

Intervenors and respondent suggest that Panhandle's grievance is speculative and insubstantial, and that it cannot be ascertained until the separate allocation proceeding as between the customers of American Louisiana, Michigan-Wisconsin and Michigan Consolidated is concluded.[13] How-

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[12] Respondent's Brief in Opposition, p. 15.

[13] Respondent's Brief in Opposition, p. 18; American Louisiana et al., Brief in Opposition, p. 14.

ever, the Commission has authorized delivery of 300,000 Mcf of gas to a market Panhandle serves and which Panhandle says is insufficient to absorb the additional volumes of 200,000 Mcf proposed to be delivered to Michigan Consolidated at Detroit.

Greenville Television Co. v. *Federal Communications Commission*, No. 12,356, D. C. Cir., decided Mar. 24, 1955, is apropos. There the court said:

> "... Even the grant of a new license does not automatically take advertising revenue away from existing licensees, but only *creates a situation* in which the new licensee may be able to get the revenue by private negotiation, yet existing licensees are 'adversely affected' and 'parties in interest.'" (Emphasis supplied.)

Thus, the mere fact that the Commission's order is said not to *per se* injure Panhandle is unimportant. The order creates the situation in which Panhandle's interests are likely to be diminished. See to the same effect, *Metropolitan Television Company* v. *United States*, No. 12,192, D. C. Cir., decided April 14, 1955.

The short of the matter is that no further hearing is required to determine the impact of the new gas on the market. The allocation question which has been held open relates primarily to the relative needs of the various customers of Michigan Wisconsin. When such proceedings are held, after the construction of the pipe line, Panhandle will certainly not be afforded an opportunity to question the over-all need for the 300,000 Mcf per day immediately to be dumped on the market. In the circumstances, Panhandle's attempt to obtain review is not premature or speculative. The Commission has determined the sufficiency of the market to its satisfaction and it cannot be expected to go over that ground again in an allocation proceeding. Even if permitted to participate in the allocation proceeding, which will certainly be resisted by the applicants on

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the basis of the holding of the court below,[14] no one would suggest that Panhandle could obtain review of this present order under the guise of reviewing a later allocation proceeding.

There is nothing insubstantial about the interest of Panhandle in this case. It has millions of dollars tied up in pipe lines to the area from which it is about to be eliminated as a competitor. The Commission has found that Panhandle had a sufficient interest to intervene and that is a fact that cannot be gainsaid. As this Court said in *Baltimore & Ohio R. Co.* v. *United States*, 264 U. S. 258,

> "... the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. ... The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest."

Respondent and intervenors seek to create the impression that although the Commission no longer has any jurisdiction over Michigan Consolidated, Panhandle might attempt to induce the Commission through some undefined powers over American Louisiana and Michigan Wisconsin, indirectly to prevent Michigan Consolidated from eliminating purchases from Panhandle. Significantly, the intervenors have not denied, as they well might have, that it is their intention to discontinue taking Panhandle gas. In any event, the petition for certiorari points out that Michigan Consolidated is no longer subject to the jurisdiction of the Federal Power Commission, to its orders or to its rules. Accordingly, the fact that the Federal Power Commission has "complete control over American Louisiana's operations" has no relation to the question whether Michigan Consolidated may be required to continue taking gas from

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[14] On the basis of the non-aggrieved status holding of the court below, the Commission has already excluded Panhandle from the producers' certificate proceeding resulting in a determination of the underlying issue of adequacy of gas supply for this project. (Order of April 18, 1955 in FPC Docket Nos. G-6067 et al.)

Panhandle. The suggestion by intervenors that until further proceedings there is no possibility of American Louisiana displacing any of Panhandle's sales to Michigan Consolidated is meaningless on its face when, as is the case, it is coupled with the assertion that should the situation arise, Panhandle "can obtain full protection of its rights from the Commission, which has ample authority to deal with such matters."[15] The fact is that the Commission has already made its finding as to additional market, issued a certificate to American Louisiana, and made no provision whatsoever to protect Panhandle. In any event, to require Panhandle to rely on the Commission's future good offices as a substitute for the review provided by statute would create a dangerous precedent.

American Louisiana accuses Panhandle of "obfuscation" because of references made to the direct sale market.[16] It is noteworthy that there is no denial of competition in this respect. Moreover, Panhandle has sought authorization from the state regulatory body, and the only opposition voiced has been Michigan Consolidated's. The nature of its opposition is well illustrated by the following quotation from the Bill of Complaint recently filed in the Michigan court:[17]

> "The availability of *this large additional supply of natural gas* to Michigan Consolidated upon the construction of the pipe line *materially affects* the issues in the McLouth procedings [sic] and should be considered by the defendant in reaching a determination on Panhandle's application."

Not only did Michigan Consolidated base its Complaint upon the American Louisiana project, but also in its brief, filed with the Michigan court on February 25, 1955, Mich-

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[15] American Louisiana et al., Brief in Opposition, pp. 14-15; see also, Respondent's Brief in Opposition, pp. 20-21.

[16] American Louisiana et al., Brief in Opposition, p. 12, n. 11; Respondent's Brief in Opposition, p. 20.

[17] App. 69.

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igan Consolidated stated its position even more categorically, as follows:[18]

> "The evidence received by the Defendant Commission showed that there was then pending before the Federal Power Commission a proceeding for the issuance of a certificate of convenience and necessity for the construction of a new pipe line to transport natural gas from the natural gas fields of Louisiana to Detroit and that Michigan Consolidated had entered into a contract with the corporation which would own and operate such pipe line for the delivery of approximately 200,000,000 cubic feet of gas per day to Michigan Consolidated at Detroit. It also showed that *the receipt of such new supply of gas would enable Michigan Consolidated to fully meet all of the natural gas requirements of customers located in its market areas, including such customers as McLouth Steel Corporation.* The 'new evidence' which Michigan Consolidated seeks to introduce in said proceedings includes evidence to show that, on October 1, 1954, the Federal Power Commission entered an order for the issuance of a certificate of convenience and necessity for the construction of such new pipe line." (Emphasis supplied.)

In the end, the respondent and intervenors are seeking to thwart review of a case in which the Commission has put the cart before the horse by concluding that the pipe line can be built and is only now attempting to take the required steps to justify this conclusion. Cf. footnote 8a, Respondent's Brief in Opposition, p. 10.

Despite this, all join in asserting that Panhandle didn't make the proper allegations of "economic injury" etc. This means that a person's status as an aggrieved party depends upon the mouthing of a ritualistic rubric which includes magic words and doesn't mean anything, whereas the petition, answer and petition for rehearing filed by Panhandle contain in the aggregate every single allegation which is said to be necessary.

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[18] App. 69.

In effect, what both respondent and intervenors have said is simply that the court below was justified in holding Panhandle not aggrieved because upon ultimate review of the record it would have had to sustain the Commission's order. Without the record in question before that court or this, what more novel, convenient or dangerous test of the *right* of review could there be?

CONCLUSION

This is not a case which depends primarily upon the particular facts as suggested by respondent. As stated in the petition, if the decision in this case stands, the review of any Commission order granting a certificate of convenience and necessity could be defeated by the simple expedient of adopting the findings of the Commission and concluding, without a record, that the party seeking review is not aggrieved. Moreover, the decision below conflicts with decisions of this Court and those of other circuits, and should be reviewed by the Court.

Accordingly, Panhandle respectfully urges this Court to grant its petition for certiorari.

William E. Miller
1100 Shoreham Building
Washington 5, D. C.
Counsel for Petitioner

Of Counsel
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions and order of the Federal Power Commission (Pet. App. pp. 16-40) are unreported. The opinion of the Court of Appeals (Pet. App. pp. 56-60) is reported at 219 F. 2d 729.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1955 (Pet. App. p. 74). The

petition for a writ of certiorari was filed on April 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court below was justified in dismissing the petition filed by Panhandle Eastern Pipe Line Company for review of an order of the Federal Power Commission, authorizing American Louisiana Pipe Line Company and Texas Gas Transmission Company to construct and operate certain pipeline facilities, on the ground that Panhandle was not aggrieved by the order as required by Section 19(b) of the Natural Gas Act.

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 821, 831, as amended, 15 U.S.C. 717r(b) provides:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that

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the order of the Commission be modified or set aside in whole or in part. * * *

STATEMENT

Petitioner Panhandle Eastern Pipe Line Company filed in the court below a petition seeking review under Section 19(b) of the Natural Gas Act, *supra*, p. 2, of the order of the Federal Power Commission issuing certificates of public convenience and necessity to American Louisiana Pipe Line Company and Texas Gas Transmission Company for the construction and operation of certain pipeline facilities (Pet. App. pp. 1-15). The court below dismissed Panhandle's petition on the ground that it was not "aggrieved" by the Commission's order and therefore without standing under Section 19(b) to seek review. The pertinent facts are as follows:

The Parties. American Louisiana applied to the Federal Power Commission for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act to construct and operate a pipeline system, with an initial capacity of 300,000 Mcf per day, and extending approximately 1,300 miles from the producing fields in Louisiana, to supply gas for markets in Michigan, Wisconsin, Iowa and Missouri. The supply of natural gas was to be obtained from producers in southern Louisiana (250,000 Mcf per day) and, in Kentucky, from the Texas Gas Transmission Corp. (50,000 Mcf per day). American Louisiana proposed to deliver 200,000 Mcf per day to Michigan Consolidated Gas Company at Detroit and 100,000

Mcf. per day to Michigan Wisconsin Pipe Line Company at Bridgeman, Michigan (Pet. App. pp. 16-17). Texas Gas also applied for authority to construct and operate facilities in Kentucky to enable it to make the proposed deliveries to American Louisiana (Pet. App. p. 17).[1]

Michigan Consolidated, Michigan Wisconsin, and American Louisiana are affiliated companies, subsidiaries of American Natural Gas Company. Michigan Consolidated distributes natural gas to ultimate consumers in Detroit, Ann Arbor and other communities in Michigan. Michigan Wisconsin operates a pipeline system and delivers gas to 16 utility companies (including Michigan Consolidated) which service communities in Wisconsin, Michigan, Iowa and Missouri.

Prior to 1946, when it began to receive gas from Michigan Wisconsin, Michigan Consolidated's sole source of natural gas was Panhandle (6 F.P.C. at 12-13). Panhandle owns and operates an extensive transmission pipeline system. However, it does not serve any of the distributing companies or communities which will receive gas from American Louisiana—with the exception of Michigan Consolidated, to which it delivers 125,000 Mcf at Detroit and 2,000 Mcf at Ann Arbor.

Prior Proceedings: In 1946, when Michigan Wisconsin was authorized to construct and operate

[1] Applications were also filed by Michigan Consolidated and Michigan Wisconsin, seeking to receive the gas from American Louisiana, but the order here involved did not dispose of those applications nor of petitions by various intervening parties seeking gas from American Louisiana and Michigan Wisconsin for communities not now served (Pet. App., pp. 17, 18, 34).

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a pipeline from Texas to supply Michigan Consolidated and its other markets, including numerous communities not then served by natural gas (5 F.P.C. 953; 6 F.P.C. 1), the Commission found that there were great unsatisfied future requirements in Detroit and the other areas (6 F.P.C. at 12-16); for example, it was estimated that the total Detroit requirements in 1952 would be 87,000,000 Mcf and Panhandle had delivered in 1945 about 32,000,000 Mcf (*id.* 13). State regulatory commissions had been compelled to restrict the use of gas (*id.*, 28-29, 30) and it had been necessary to allocate and curtail deliveries from Panhandle's system in the winters of 1944-45 and 1946-47 (*id.*, 65).

In addition, in its supplemental opinion and order in that proceeding the Commission dealt specifically with the continuing interests of Panhandle in the Detroit market. 6 F.P.C. 58. It found that all Panhandle's applications to increase its service to the area had been granted but that Panhandle had at no time indicated any intention or desire to meet the great and growing demand (*id.*, 64-70). Further, while the contract between Panhandle and Michigan Consolidated was to expire on December 31, 1951, the Commission directed the continuation of Panhandle's pattern of service and its participation in future growth of the market. 6 F.P.C. 91.[2]

[2] The order authorizing the Michigan Wisconsin pipeline was reviewed on Panhandle's petition, and affirmed. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (C.A. D.C.), certiorari denied, 335 U.S. 854. Michigan Wisconsin's plan of financing was approved by the

Subsequently, in 1950, the Commission authorized Panhandle to increase its system capacity to 850,000 Mcf per day, an increase of about 350,000 Mcf. 9 F.P.C. 721. The Commission also gave an opportunity to Panhandle to negotiate contracts with its customers for an equitable share of the additional gas. 10 F.P.C. 185, 189-90. Panhandle negotiated such contracts with 47 of its customers, *i.e.*, all but four with whom it declined to contract. Included among the latter group was Michigan Consolidated which had sought an increase to 202,000 Mcf in the gas delivered to it.[3] By order issued in March 1952, the Commission declined to take any action on Michigan Consolidated's request for increased deliveries; noting that despite its increased capacity Panhandle had applied for authority to abandon some 37,500 Mcf of its service to Michigan Consolidated, the Commission ordered that, pending its determination in the abandonment proceeding, Panhandle should continue to deliver 127,000

Securities and Exchange Commission, and then was reviewed on Panhandle's petition and upheld by the Eighth Circuit. *Panhandle Eastern Pipe Line Co.* v. *Securities and Exchange Commission,* 170 F. 2d 453.

[3] Meanwhile, since it was clear that despite its increased capacity Panhandle would again be unable to meet the demands during the winter of 1951-52, the Commission allocated the available gas among Panhandle's numerous customers. In making this allocation, the Commission advised that it "does not expect, nor does it now intend, to issue further orders allocating the capacity of Panhandle pipeline system during ensuing winter periods." 10 F.P.C. 328, 338. For allocations made during the two previous winters, see 9 F.P.C. 1330; 6 F.P.C. 196.

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Mcf to Michigan Consolidated.[4] Simultaneously, the Commission ordered Panhandle to deliver the prior contracted amounts of gas to the three other customers to whom it had declined new contracts, as well as to Michigan Consolidated and the customers with whom new contracts had been negotiated.

Both Michigan Consolidated and Panhandle sought review of this order, Michigan Consolidated on the ground that it was discriminatory not to increase its allotment and Panhandle on the ground that the result of the Commission's order was to require it to deliver gas beyond its rated capacity of 850,000 Mcf per day and so improperly to require it to increase its capacity. The Court of Appeals for the Third Circuit, in April 1953, affirmed the allocation of only 127,000 Mcf to Michigan Consolidated, pointing out that the Commission's action was directed merely at maintaining the status quo pending its disposition of Panhandle's application to reduce its service to Michigan Consolidated. *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 203 F. 2d 895, 900-901 (C.A. 3). The Third Circuit at the same time reversed the Commission, on Panhandle's petition,

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[4] Michigan Consolidated has made several other unsuccessful attempts to obtain additional gas from Panhandle (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (C.A. 6); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F. 2d 942 (C.A. 6), or to obtain damages for failure to deliver sufficient amounts. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 117 F. Supp. 551, 558-60 (E.D. Mich.).

holding that the Commission could not direct deliveries of gas in excess of capacity and remanding the case to the Commission for its determination of a fair distribution of Panhandle's available capacity among all customers. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 204 F. 2d 675 (C.A. 3). In view of this remand, the Third Circuit also directed the Commission to reconsider its order issued in August 1952 denying Panhandle's application to reduce its service to Michigan Consolidated. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 204 F. 2d 925 (C.A. 3). These proceedings were then combined by the Commission with others for full consideration of fair distribution of Panhandle's capacity. 19 Fed. Reg. 1071-73.

The Present Proceeding: When American Louisiana and Texas Gas filed their applications for certificates of public convenience and necessity, Panhandle was permitted to intervene on the representation that it had a substantial economic interest in the markets to be served by American Louisiana and therefore was a competitor of American Louisiana (Pet. App. p. 30).[5] Hearings on the related applications of American Louisiana, Texas Gas, Michigan Wisconsin and Michigan Consoli-

[5] Panhandle's petition for leave to intervene set forth (at pp. 4-5) its current sales to Michigan Consolidated and other Michigan markets and also alleged that Panhandle and a subsidiary contemplated filing in the near future applications for certificates authorizing new facilities which "would render unnecessary and uneconomic the construction of the facilities proposed" by American Louisiana and the other applicants. (pp. 8-9)

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dated (see *supra*, pp. 3-4 and n. 1) were commenced on March 8, 1954 (Pet. App. p. 17). After recess on August 6, 1954, the Commission, at the request of American Louisiana, set the case down for oral argument and filing of briefs (Pet. App. pp. 17-18), after which it issued the opinion and order on October 1, 1954 (Pet. App. pp. 16-40), granting certificates to American Louisiana and Texas Gas.

In addition to making findings as to adequacy of design, availability of gas supply, financing and reasonableness of anticipated price (Pet. App. pp. 21-29), the Commission found that the present supply of gas available in the Michigan and Wisconsin markets involved had been "clearly inadequate" so that "stringent restrictions" had been imposed by it as well as the State Commissions on the expansion of service (Pet. App. p. 18). The Commission reviewed in detail the demands for gas—present and foreseeable—for residential and commercial as well as for firm and interruptible industrial uses (Pet. App. pp. 18-21), and reached the "inescapable" conclusion that there is a sufficient market to support the proposed project (Pet. App. p. 21). It directed, however, that, despite the issuance of the requested certificates to American Louisiana and Texas Gas, the proceeding should continue to determine more particularly the disposition of the gas (Pet. App. p. 21).[6] Finally, the Commission found that, although Panhandle's intervention had al-

[6] The Commission therefore deferred action on the applications of Michigan Consolidated and Michigan Wisconsin to receive gas from American Louisiana (Pet. App. pp. 32, 34).

leged competition, there was no proposal by Panhandle to meet the additional needs of Michigan Consolidated or of the other customers of Michigan Wisconsin and consequently it could not see wherein Panhandle would be aggrieved by the granting of the certificates (Pet. App. p. 30). Accordingly, after directing the omission of the intermediate procedure,[7] the Commission [8] ordered the issuance of certificates on the condition (among others) that the construction of the pipeline by American Louisiana should not be undertaken until the producers supplying a sufficient amount of gas had also received certificates from the Commission (Pet. App. pp. 32-34).[8a]

In its petition for review in the court below, Panhandle alleged that it "is a competitor of American Louisiana, Michigan Consolidated, Mich-

[7] The Commission found that American Louisiana's gas purchase contracts gave the producers the right to terminate on October 1, 1954 if no certificate was obtained and that if that eventuality had occurred, the "crying demand for additional quantities of natural gas in the Michigan-Wisconsin area * * * may not be satisfied for a considerable period of time" (Pet. App. p. 29).

[8] While two Commissioners dissented, their dissent was primarily on the ground that in view of *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, the certificates should not have been granted until after American Louisiana's suppliers had themselves applied for certificates (Pet. App. pp. 35-38). They agreed with the majority

> * * * concerning the demand for natural gas in the markets which this project proposes to serve. We have no doubt that this market can use all of the gas the applicant originally hoped to deliver, and more too, provided the price is low enough * * * [Pet. App. p. 38].

[8a] This condition has been fulfilled and the construction of the major portion of the pipeline now awaits the termination of this litigation.

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igan Wisconsin and Texas Gas within the purview of Section 15(a) of the Natural Gas Act" (Pet. App. p. 3). It also alleged that Michigan Consolidated receives about 42% of its gas from Panhandle, that Panhandle sold large volumes of gas to Michigan Consolidated for resale to consumers in Detroit, Ann Arbor and their environs, and that it sold 18,000 Mcf of gas per day to Texas Gas (Pet. App. pp. 3-4). Asserting that it was a party to the proceedings before the Commission and aggrieved by its orders (Pet. App. pp. 6, 7), Panhandle claimed that, in addition to numerous other alleged errors, there was no substantial evidence with respect to the availability of sufficient markets to absorb the volumes of gas contemplated by the certificate to American Louisiana (Pet. App. p. 12).

The court below granted the motions to dismiss filed by the Commission and the intervenors on the ground that the petition for review did not show that Panhandle was "aggrieved by an order issued by the Commission" as required by Section 19(b) of the Natural Gas Act, *supra*, p. 2 (Pet. App. pp. 56-61). While the court recognized that Panhandle had alleged that it was aggrieved by the Commission's order, "in its detailed exposition of the situation about which it complains no factual allegations are given which support the contention that it is aggrieved. The naked assertion is not enough" (Pet. App. p. 57). The court went on to note that it is undisputable that there is a crying demand for additional natural gas in Michigan and Wisconsin. Panhandle, the court pointed out, has not filed a competitive application, nor has it evinced any

interest in meeting this demand, and, indeed, it is attempting to abandon part of its service (Pet. App. p. 58). The court then referred to the abandonment proceeding (*supra*, pp. 6-7, 8) and concluded that, whatever the outcome of that proceeding, the gas delivered by American Louisiana to Michigan Consolidated "is not in displacement of any part of its Panhandle allotment but over and above it in order to provide for the increased requirements of the Michigan Consolidated territory" (Pet. App. p. 59).[9]

ARGUMENT

The resolution of the issue presented by this case, *i.e.*, whether the court below erred in holding that Panhandle was not aggrieved by the Commission's orders, depends primarily upon the particular facts. The court below accepted the well established standards relating to aggrievement and held only that under these standards Panhandle was not aggrieved by the administrative decision. And since this conclusion is clearly correct on the facts, particularly those well-known to that court

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[9] With respect to Texas Gas, the petition for review chiefly challenged the sufficiency of its gas supply. It was asserted that this supply included 18,000 Mcf per day from Panhandle, and that there was pending a proposed discontinuance of Panhandle's service to Texas Gas (Pet. App. pp. 12-13). Apparently, petitioner contended that its desire to abandon this service may be frustrated because the Commission recognized Texas Gas' obligation to supply American Louisiana (Pet. App. pp. 70-72). The Court of Appeals found no such result expressed or implied in the Commission's order herein and no perceptible aggrievement (Pet. App. p. 60). Panhandle does not press its contentions regarding Texas Gas in the petition to this Court. Pet. p. 8, n. 2.

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by virtue of the recent litigation among the parties, review by this Court is unwarranted.

1. Section 19(b) of the Natural Gas Act, *supra*, pp. 2-3, limits the initiation of review proceedings to any party to the Commission's proceedings "aggrieved" by its order. The decisions of this Court construing the similar language in other statutes relating to judicial review of administrative action have established that a person is "aggrieved" if he sustains substantial direct injury as a result of an order, even though not such injury as would give him standing to maintain an action for relief from it. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 476-77; *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U.S. 385, 390; see also *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 464-65 (C.A. D.C.). As petitioner points out, most such aggrieved persons, other than applicants, are competitors attempting to protect their existing position in a market. But in each case they were recognized as aggrieved only because of the direct injury which was to be inflicted upon them. For example, in the *Sanders* case, *supra*, the existing radio station alleged that there was insufficient advertising revenue to support two stations, and consequently that the issuance of a license for a second station would result in substantial financial loss to it. See 106 F. 2d 321, 323. Similarly, all the other decisions stemming from this doctrine and permitting review are based on claims of injury,

either economic (*e.g., National Coal Ass'n* v. *Federal Power Commission, supra; Associated Industries* v. *Ickes,* 134 F. 2d 694 (C.A. 2)), or of some other nature. *E.g., Federal Communications Commission* v. *National Broadcasting Co.,* 319 U.S. 239 (electrical interference); *Reade* v. *Ewing,* 205 F. 2d 630 (C.A. 2) (harmful ingredients).

It is also settled that the harm must be substantial and probable in order to give standing to seek review. Administrative decisions often have impact on substantial segments of the public and may possibly affect a large number of interests in some way. In a proceeding like this one, besides existing natural gas companies, the Commission permits the participation of local governmental units and regulatory bodies, as well as persons representing the interests of producers of competing fuels, labor unions, and railroads. Pet. App. pp. 23, 30. See, also, e.g., 6 F.P.C. at 7. But since it would unreasonably burden the administrative process if all could be considered "aggrieved",[10] review is held limited to those "who can show some direct adverse effect traceable with reasonable certainty" to the agency action. *U.S. Cane Sugar Refiners' Ass'n* v. *McNutt,* 138 F. 2d 116, 120 (C.A. 2); see also *National Coal Ass'n* v. *Federal Power Commission,* 191 F. 2d at 465; *National*

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[10] The Commission's permission to Panhandle to intervene did not constitute recognition that it might be aggrieved by any order in the proceeding. 18 C.F.R. 1.1(f)(13). See *Interstate Electric, Inc.* v. *Federal Power Commission,* 164 F. 2d 485 (C.A. 9).

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Broadcasting Co. v. *Federal Communications Commission*, 132 F. 2d 545, 548 (C.A. D.C.), affirmed, 319 U.S. 239; *Yankee Network, Inc.* v. *Federal Communications Commission*, 107 F. 2d 212, 215 (C.A. D.C.). As Justice Rutledge, then on the Court of Appeals for the District of Columbia, said, writing a gloss on *Sanders* in *National Broadcasting Co.* (132 F. 2d at 548):

> Presumably by the decision in the Sanders case the Supreme Court intended that the financial injury must be something more than nominal or highly speculative. It seems not unreasonable to read the opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review.

2. To determine whether there was such "probable injury of a substantial character" to Panhandle, the court below properly looked to the petition to review and its assignment of errors. *Reade* v. *Ewing*, 205 F. 2d 630 (C.A. 2); *National Broadcasting Co.* v. *Federal Communications Commission*, *supra*, 132 F. 2d at 548; *Yankee Network, Inc.* v. *Federal Communications Commission*, *supra*, 107 F. 2d at 224; *Great Western B. Ass'n* v. *Federal Communications Commission*, 94 F. 2d 244, 248 (C.A. D.C.). And as the Court of Appeals held

here (Pet. App. p. 57), Panhandle's naked assertion of aggrievement in general terms is not sufficient. The petition to review must contain supporting allegations of fact, which are made in good faith and are substantial. *Reade* v. *Ewing, supra; Interstate Electric, Inc.* v. *Federal Power Commission,* 164 F. 2d 485 (C.A. 9); *Pittsburgh Radio Supply House* v. *Federal Communications Commission,* 98 F. 2d 303, 305-06 (C.A. D.C.).[11]

Panhandle, in its petition for review, alleged that it is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas, and it described in general terms its sales to Michigan Consolidated and to others in the State of Michigan. However, despite the Panhandle service in the Detroit area, there plainly was a vast unsatisfied demand for gas in that region which American Louisiana hoped to satisfy. Panhandle avers no offer nor any apparent attempt to supply this unsatisfied demand notwithstanding its assertion in January 1954, in its petition for intervention before the Commission, that it contemplated doing so. On the contrary, it has continued diligently to prosecute its application to

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[11] The opinion in *Yankee Network, Inc.* v. *Federal Communications Commission, supra,* states that even if a petition is sufficient on its face, the court may examine the record and must dismiss the appeal if no aggrievement appears. 107 F. 2d at 224. See *Woodmen of the World Life Ins. Soc.* v. *Federal Communications Commission,* 105 F. 2d 75 (C.A. D.C.). But there is no implication, as petitioner apparently contends (Pet. p. 22), that a court is under a duty to search the record for facts to cure a petition insufficient on its face.

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reduce its service to Michigan Consolidated. These circumstances fully justified the conclusion of the court below that there was nothing to support Panhandle's bare allegation that it was a competitor for the service contemplated in the American Louisiana certificate, particularly since the latter service was intended not to supplant but rather to supplement Panhandle's.

Petitioner's main answer (see Pet. pp. 17, 20) is that it expressly disputes the existence of sufficient unsupplied demand to absorb the American Louisiana Gas—a fact which the Court of Appeals thought "can hardly be disputed" (Pet. App. p. 58)—and therefore that on the face of its petition petitioner is seeking to protect its existing market. And petitioner points to the allegations in its review petition that the certificate was granted "in the absence of substantial evidence with respect to the availability of sufficient markets to absorb the volume of gas contemplated." Pet. App. p. 12; *id.*, p. 9.[12]

But these allegations merely repeat the pattern of other paragraphs of the petition which assert

[12] Panhandle's contention (Pet., p. 18) that earlier orders of the Commission indicate doubt as to the adequacy of the markets is erroneous. In the order of Aug. 2, 1954 (which was quoted in the Aug. 13, 1954, order), the Commission dsicussed only the producers' compliance with the Act as an element in an applicant's being "able and willing" to perform. To support this, the Commission noted that willingness and ability had to be based on subsidiary findings; "marketability" was listed as one of these ordinary prerequisites but there is no hint of doubt as to the markets available here. See Pet. App. pp. 41-42, 45-46.

the "absence of substantial evidence" of various statutory requisites. (Pet. App. pp. 8-12) No affirmative allegations were made that the markets are insufficient and that American Louisiana will therefore conflict with Panhandle in sales to Michigan Consolidated. Nor could such allegation be made at this stage for, while the Commission authorized the American Louisiana certificate, it expressly continued the proceeding for a *subsequent* determination of how the gas should be distributed; until that determination is made, the extent to which American Louisiana gas will serve the Detroit market is unknown.

Moreover, in its petition in this Court, Panhandle apparently continues to argue in part on the erroneous assumption that it may demand from the Commission sufficient showing of adequacy of markets to fulfill the statutory standards. (Pet. pp. 18-19). Panhandle, however, may present the errors in the Commission's decision only if it has shown that it is aggrieved by the order, and the burden is on it to make that showing. In this instance, that burden could be borne only by sufficient averments that no unsatisfied demand existed and it was Panhandle's obligation to show the Court of Appeals that such was the case. It cannot rely on a simple denial of the Commission's finding, without specific and detailed allegations showing, at least *prima facie,* that the Commission was wrong and that Panhandle's market would be actually and substantially affected to its detriment.

Finally, it is pertinent to note that the court

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below had recently heard one case in which Michigan Consolidated challenged as insufficient the volume of gas received from Panhandle under the Commission's restrictive allocations (203 F. 2d 895); another, in which Panhandle attacked a Commission order directing the delivery of amounts of gas in excess of the capacity of Panhandle's system, in order to avoid discrimination (204 F. 2d 675); and still another in which Panhandle sought to reduce its service to Michigan Consolidated (204 F. 2d 925). Informed by this litigation and its history of enforced curtailment of natural gas use, the court below was clearly justified in bringing to bear its experience and on that basis to recognize the crying demand for natural gas in this area.[13] Cf. *United States* v. *Pink*, 315 U.S. 203, 217, and cases there cited.[14]

3. Panhandle seeks to assert two additional

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[13] Not only did the court below know from its experience in the prior litigation that, despite Panhandle's allegation, the existing and potential markets were sufficient to absorb the American Louisiana gas but the Commission, which in addition was familiar with the particular record in this case, was unanimous on the point (see *supra*, pp. 9-10, n. 8). Summarizing its detailed discussion of the actual and potential demand in the areas to be served by American Louisiana (Pet. App. pp. 18-21), the Commission majority commented that "the conclusion is inescapable that there exists a market sufficient to support the construction of a project of the magnitude proposed by American Louisiana" (Pet. App. p. 21). The evidence in the administrative record fully supports this conclusion.

[14] Of the members of the bench in the instant case, Judge Kalodner sat on all three of the recent cases. Judge McLaughlin, who wrote the opinion for the court below, participated in 203 F. 2d 895 and 204 F. 2d 675, while Judge Hastie participated in 204 F. 2d 925.

grounds of aggrievement to supplement the general allegations of its petition for review. First, it claims that it already directly competes with Michigan Consolidated for sales to industrial customers, citing as an example the current controversy over sales of gas to McLouth Steel Co. (Pet. p. 17). Apart from the fact that Panhandle made no point of this alleged competition before the Commission and in its petition for review in the Court of Appeals, it is plain that, whatever the results in individual transactions, no injury is likely unless the total demand in the market is less than all the gas available.

Second, Panhandle alleges that it may be excluded from any sales to Michigan Consolidated, whether 127,000 Mcf or 87,500 Mcf per day, because of the affiliation among American Louisiana, Michigan Consolidated, and Michigan Wisconsin. It points to the exemption of Michigan Consolidated from the Natural Gas Act as presaging this injury to it. (Pet. pp. 22-24.) However, there is no indication or allegation that American Louisiana gas could or would supplant that supplied by Panhandle in view of the vast unsatisfied demand. Furthermore, American Louisiana and Michigan Wisconsin, the affiliates supplying Michigan Consolidated, are natural gas companies subject to regulation under the Act and are therefore not free to oust Panhandle at their pleasure.[15] The initial

[15] Changes in service are subject to Commission supervision under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C.

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certificate of public convenience and necessity granted to Michigan Wisconsin was upon the express Commission requirement that Panhandle be afforded reasonable opportunity to deliver and sell to Michigan Consolidated quantities of gas corresponding to the previous pattern of service, and to participate in future growth of the market. 6 F.P.C. 91. In this case, disposition of the American Louisiana gas has not yet been made by the Commission (Pet. App. pp. 21, 33-34; *supra,* pp. 9, 18) and it cannot be assumed that the Commission will not provide similar protection for Panhandle. Until the Commission has acted, any aggrievement to Panhandle on this score is purely speculative.

717c, 717d. Any alteration in the volumes or allocations fixed in the certificate require application under Sec. 7 of the Act, 15 U.S.C. 717f.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
LIONEL KESTENBAUM,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

WILLIAM J. GROVE,
Assistant General Counsel,
Federal Power Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY,
A Corporation,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent

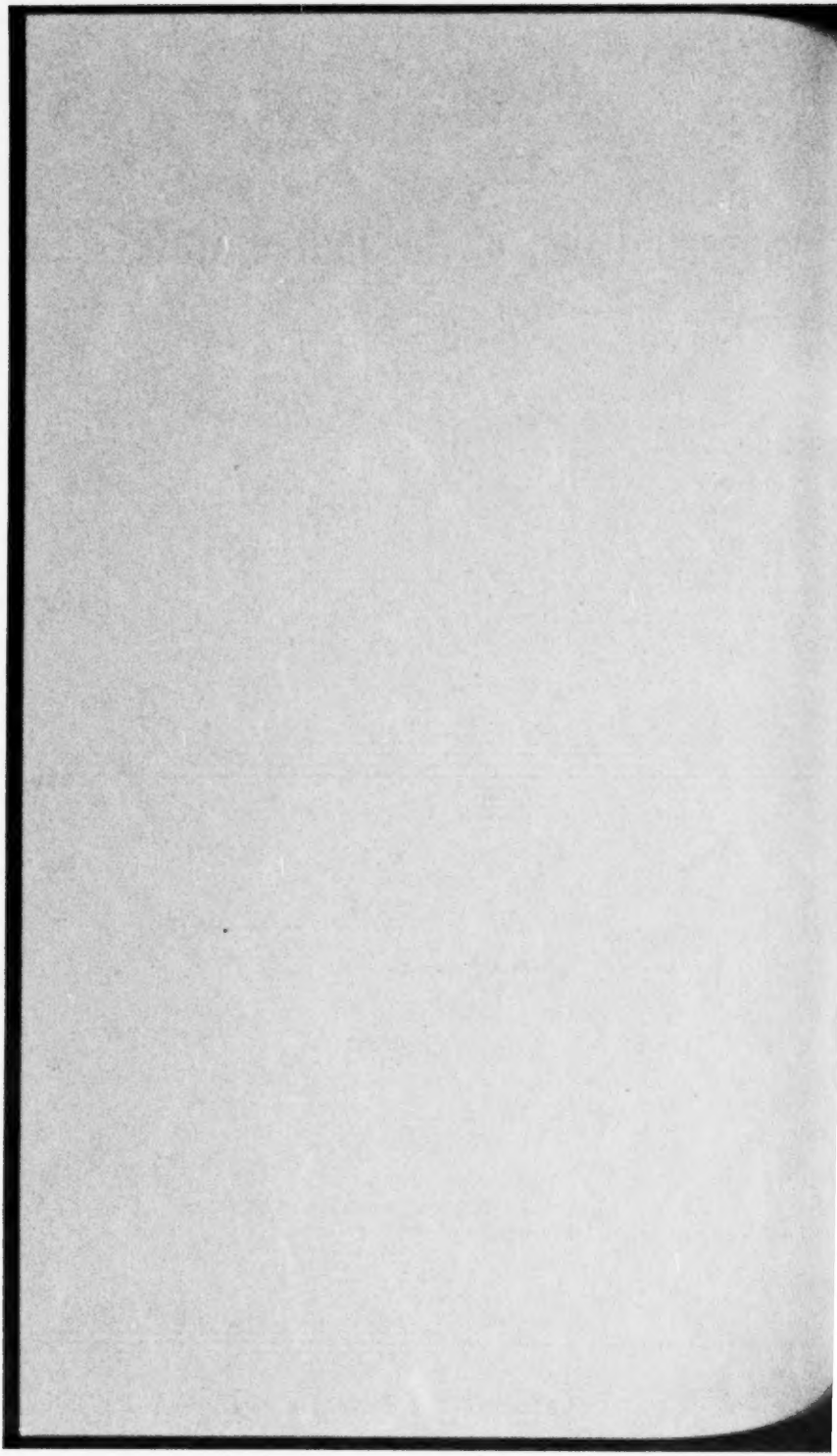
BRIEF FOR INTERVENOR, COUNTY OF WAYNE, IN OPPOSITION FOR WRIT OF CERTIORARI

SAMUEL BREZNER,
Assistant Prosecuting Attorney,
Wayne County, Michigan,
3400 Guardian Building,
Detroit 26, Michigan,
Counsel for Intervenor.

GERALD K. O'BRIEN,
Prosecuting Attorney for Wayne
County, Michigan.

LEONARD SIMONS,
Special Assistant Prosecuting Attorney,
County Utilities Counsel,
3400 Guardian Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan



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OPINIONS BELOW

The opinion of the Court of Appeals dismissing the petition for review is reported at 219 F. 2d 729. Opinion No. 276 and accompanying order issued by the Federal Power Commission in Docket Nos. G-2306, et al. (Pet. App. 16), have not yet been reported.[1]

[1] Appendix references are to the separate appendix volume accompanying the petition for certiorari.

QUESTION PRESENTED

Whether the Court of Appeals below correctly dismissed petitioner's petition for review of an order of the Federal Power Commission authorizing the construction and operation of a new interstate pipe line project to an area in which there exists "a crying demand" for additional quantities of gas, on the ground that petitioner is not "aggrieved" within the meaning of the Natural Gas Act, where the authorized project is the only proposal to supply the required gas, petitioner is attempting to curtail its gas deliveries in the area, and petitioner has not alleged any facts to show that it will be injured by the authorized project.

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act of 1938, 15 U. S. C. Sec. 717r(b), 52 Stat. 831, is set forth in Panhandle's petition (pp. 3, 4).

STATEMENT OF THE CASE

On October 1, 1954, the Commission issued an order authorizing American Louisiana Pipe Line Company to construct and operate a natural gas pipe line system from south Louisiana to Detroit, Michigan.

The American Louisiana project was the only proposal submitted to the Commission to relieve the severe gas shortage in Detroit, as well as in the other communities served by the American Natural Gas System, and this project will double the supply of gas for Detroit and the County of Wayne.

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The County of Wayne, a municipality and body politic and an intervenor in these proceedings before the Commission and the Court of Appeals below, includes within its boundaries the City of Detroit and the Detroit metropolitan area with a population in excess of 2,500,000. It embraces one of the greatest centers of industrial production in the country, if not the greatest. The products of its industries are essential to the welfare of the nation in both peace and war and the continued manufacture of such products is dependent upon an adequate supply of natural gas.

Michigan Consolidated Gas Company is the sole supplier of natural gas to the entire Detroit metropolitan area and to nearly all of the remaining portion of Wayne County.

Pursuant to directives of the Michigan Public Service Commission, restrictions have been in effect on the addition of space heating customers in Michigan by Michigan Consolidated since May, 1950, and on the sale of interruptible and large volume industrial and commercial gas since 1953.

In November, 1953, American Louisiana filed an application with the Federal Power Commission for authority to construct and operate its proposed project, which will introduce to Wayne County the additional volumes of gas so vitally required by its residents and industries.

Panhandle intervened in the proceedings before the Commission and succeeded in prolonging the hearings for months through dilatory tactics. Panhandle, however, offered no competitive proposal to bring additional gas to Wayne County or to any other market area sought to be served by American Louisiana gas.

In fact, Panhandle at the present time is vigorously pressing its application before the Commission to *reduce* its deliveries to Wayne County by 30%. This attempted abandonment was denied once by the Commission, but upon Panhandle's appeal to the Court of Appeals for the Third Circuit it was remanded to the Commission because of its interrelation to the question of the allocation of Panhandle's gas supply. *Panhandle v. F. P. C.*, 204 F. 2d 925.

After the Commission denied Panhandle's request for a rehearing of the order issuing a certificate of public convenience and necessity to American Louisiana, Panhandle petitioned the Court of Appeals for the Third Circuit for review of the Commission's order. The petition for review was dismissed by the Court of Appeals below upon motions of the Commission, Wayne County, American Louisiana and other interested parties on the ground that Panhandle had not alleged facts to show that it is legally "aggrieved" by the Commission's order within the meaning of Section 19(b) of the Natural Gas Act. Panhandle's request for rehearing on this dismissal was denied.

ARGUMENT

Although numerous parties, including all the state and municipal regulatory bodies charged with the duty of protecting the interests of the gas consuming public in the market areas proposed to be served with additional natural gas by the American Louisiana project, intervened and participated in the proceedings before the Commission, Panhandle alone has filed a petition for review of the Commission's order authorizing the project.

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Only Panhandle, twice condemned by this Court[2] for endeavoring to skim the cream from the natural gas business by attempting to channel its supply of gas into unregulated direct sales to industry, is now before this Court seeking a writ of certiorari.

Here we have the situation of a petitioner, who has been found by the Commission administering the Natural Gas Act and the Court below not to be "aggrieved" within the meaning of that Act, availing itself of a judicial review to which it is not entitled in order to further harass and delay a project which the public interest requires and demands.

There can be no disputing the fact that there is a "crying demand"[3] for additional gas in the areas, including Wayne County, proposed to be served by the American Louisiana project. The restrictions upon additional residential and industrial gas sales imposed pursuant to orders of the Michigan Public Service Commission[4] dating back to 1950 speak for themselves.

Panhandle has blandly announced to this Court that it "does not wish to serve"[5] these market areas with the additional volumes of gas which they seek so urgently.

Panhandle, furthermore, concedes that it is actually endeavoring to *curtail its present deliveries* of gas to Wayne County from 125,000 Mcf to 87,500 Mcf per day.[6]

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[2] *Panhandle Eastern Pipe Line Company v. P. S. C. of Indiana*, 332 U. S. 507; *Panhandle v. Michigan P. S. C.*, 341 U. S. 329.

[3] Pet. App. 29.

[4] Pet. App. 18.

[5] Pet. 19.

[6] Pet. 10, fn 3.

Thus, Panhandle not only refuses to supply the potential consumers of natural gas but, in addition, Panhandle refuses adequately to serve the *existing* consumers.

Wayne County has for many years participated in proceedings before the Commission and the courts in the interest of the public it represents involving the efforts of the American Natural Gas Company to bring adequate quantities of natural gas to these areas and the attempts of Panhandle to block this program.

The American Natural Gas Company built the Michigan Wisconsin Pipe Line Company system some five years ago in order to meet the rapidly expanding gas needs of these areas and Panhandle unsuccessfully attempted to review and set aside the Commission's action authorizing that project, *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (C. A. D. C.), 169 F. 2d 881, cert. den. 335 U. S. 854.

Panhandle's own expansion programs have resulted in the consumers of Wayne County subsidizing Panhandle's increased capacity through the collection of a rolled in rate notwithstanding the fact that not one additional cubic foot of such increased capacity was made available to Wayne County.

In the instant proceedings Panhandle has consistently sought to nullify the only actual endeavor to alleviate our severe gas shortage. If this project fails because of Panhandle's selfish determination, the consumers of Wayne County will be relegated to the hopeless position in which they found themselves prior to the filing with the Commission of the American Louisiana application. No other company has indicated any intention of undertaking a venture to bring additional supplies of gas to Wayne County and the other gas starved market areas of the

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American Natural Gas system. On the basis of the events in the instant case anyone contemplating such an undertaking would be faced with years of negotiating and planning, and assuming it were successful in this regard another year of hearings, many months of court appeals and an additional eighteen months construction period before its proposal could bear fruit.

The Court of Appeals below clearly committed no legal error in dismissing Panhandle's petition for review.

The decisions of the Court below, other Circuit Courts of Appeals and this Court are uniform in requiring a party seeking review of an administrative order on the ground that it is "aggrieved" to present *facts* which show that such party will suffer direct, immediate and substantial economic loss.[7]

The Court of Appeals below was entirely correct in its statement of the law that the "naked assertion is not enough" and in its holding that Panhandle had not in its petition for review set forth the requisite facts to support its claim of aggrievement.[8]

Wayne County earnestly submits to this Court that Panhandle has not only failed to allege facts to show that it will suffer injury as a consequence of the Commission's order, but, furthermore, that there is nothing Panhandle

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[7] *Interstate Electric v. Federal Power Commission*, 164 F. 2d 485 (C. A. 9, 1947); *United States Cane Sugar Refiners' Ass'n. v. McNutt*, 138 F. 2d 116 (C. A. 2, 1943); *Pittsburgh Radio Supply House v. Federal Communications Commission*, 98 F. 2d 303 (C. A. D. C., 1938); *National Coal Ass'n. v. Federal Power Commission*, 191 F. 2d 462 (C. A. D. C., 1951); *National Broadcasting Co. v. Federal Communications Commission*, 132 F. 2d 545 (C. A. D. C., 1942, affirmed 319 U. S. 238, 1943); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470.

[8] Pet. App. 57.

could have said which would have permitted a finding of direct and immediate injury.

Finally, Wayne County is concerned solely with the interest of the public which it represents in these proceedings. In all other respects it is a disinterested party. The additional volumes of natural gas that the American Louisiana project will provide are indispensable not only to the health and well-being of the residential consumers in this area but also to its industry which must have this gas if it is to discharge its heavy responsibilities to the country from the standpoint of the general economy and national defense. Accordingly, Wayne County respectfully requests this Court to deny promptly "Panhandle's" petition, which is wholly lacking in merit and thereby expedite the realization of a project of vital concern not only to Wayne County but to the nation.

CONCLUSION

The finding of the Court of Appeals below that Panhandle's petition for review of the order of the Federal Power Commission granting a certificate of public convenience and necessity to American Louisiana Pipe Line Company did not contain any allegations of fact to support Panhandle's claim that it is "aggrieved" by such order within the meaning of Section 19(b) of the Natural Gas Act is without error and is consistent with the decisions of the various United States Courts of Appeals and of this Court.

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Wherefore, Wayne County prays that Panhandle's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit to review its judgment be denied.

Respectfully submitted,

SAMUEL BREZNER,
Ass't Prosecuting Attorney,
Wayne County, Michigan,
3400 Guardian Building,
Detroit 26, Michigan,
Counsel for Intervenor.

GERALD K. O'BRIEN,
Prosecuting Attorney,
Wayne County, Michigan.

LEONARD SIMONS,
Special Ass't Prosecuting Attorney,
County Utilities Counsel,
3400 Guardian Building,
Detroit 26, Michigan.

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Section 7(b) 15
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Section 19(b) 3, 7, 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 737

PANHANDLE EASTERN PIPE LINE COMPANY, a Corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR INTERVENORS, AMERICAN LOUISIANA PIPE LINE COMPANY, MICHIGAN WISCONSIN PIPELINE COMPANY AND MICHIGAN CONSOLIDATED GAS COMPANY, IN OPPOSITION *

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* All of the other intervenors joined in the motions to dismiss in the court below. These intervenors are: the Michigan Public Service Commission; the City of Detroit; the County of Wayne, Michigan; the City of Milwaukee; Texas Gas Transmission Corporation; Milwaukee Gas Light Company; Wisconsin Public Service Corporation; Madison Gas & Electric Company; Wisconsin Power & Light Company; Wisconsin Fuel & Light Company; Fort Madison Gas Company; St. Joseph Light & Power Company; City Gas Company (Antigo); Wisconsin Rapids Gas and Electric Company; Wisconsin Rapids "City Gas" Company, and Merrill Gas Company.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit dismissing the petition for review is reported at 219 F. (2d) 729. The opinion and order of the Federal Power Commission (Pet. App. 16-40) have not yet been reported.[1]

QUESTION PRESENTED

Whether the court below properly held on the facts of this case that the Petitioner, an interstate pipeline company, is not "aggrieved" by an order of the Commission authorizing a new pipeline to supply the *additional* natural gas required by 16 distributing companies, where

(1) Petitioner admittedly did not propose and admittedly does not desire to supply any of such additional gas.

(2) Petitioner is a limited and partial supplier of only one of the distributing companies and is seeking authority to abandon 30 percent of its deliveries to that company.

(3) Petitioner did not allege that it will suffer any economic or other injury by reason of the Commission's action.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. 717, *et seq.*, are set forth in the Appendix to this brief, *infra*, pp. 17-18.

STATEMENT

The Petitioner, Panhandle Eastern Pipe Line Company ("Panhandle"), seeks review of a decision of the Court of Appeals for the Third Circuit dismissing Panhandle's petition to review and set aside an opinion and order of the Federal Power Commission. By that opinion and order (Pet. App. 16-40), the Commission issued a certificate of public convenience and necessity under Section 7(c)

[1] Appendix references are to the separate appendix volume accompanying the petition for certiorari.

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of the Natural Gas Act to American Louisiana Pipe Line Company ("American Louisiana") authorizing American Louisiana to construct a natural gas pipeline from gas fields in Louisiana to provide the additional natural gas required by 16 distributing companies serving numerous communities in Michigan, Wisconsin, Iowa and Missouri. At the same time, the Commission authorized Texas Gas Transmission Company ("Texas Gas") to deliver an agreed upon volume of gas to American Louisiana near Slaughters, Kentucky.[2]

The Court of Appeals concluded, as had the Commission, that Panhandle is not "aggrieved" by the Commission's action and thus had no standing under Section 19(b) of the Act to review its opinion and order. The facts, briefly, are these:

Panhandle, the Petitioner herein, owns and operates an interstate pipeline system which supplies natural gas to 49 utility companies in the Midwest, including Michigan Consolidated Gas Company ("Michigan Consolidated"). Michigan Consolidated distributes natural gas to the consuming public in Detroit, Ann Arbor, Grand Rapids, Muskegon, and other important communities in the State of Michigan. With the exception of Michigan Consolidated, Panhandle does not serve nor desire to serve any of the distributing companies to be supplied with gas from American Louisiana.

For many years, Panhandle has delivered a maximum of 125,000 Mcf of natural gas per day to Michigan Consolidated at Detroit and a maximum of 2,000 Mcf per day at Ann Arbor. Some ten years ago these volumes became seriously inadequate to meet the increasing requirements of the public served by Michigan Consolidated, but Panhandle refused to increase its deliveries to Michigan Consolidated. Accordingly, American Natural Gas Company ("American Natural"), the parent company of Michigan

[2] The Texas Gas aspect of the Commission's opinion and order is not discussed in the Petition (see Pet. 8, fn. 2).

Consolidated, organized Michigan Wisconsin Pipe Line Company ("Michigan Wisconsin"), which built and now operates an interstate pipeline system supplying natural gas to Michigan Consolidated in addition to that delivered by Panhandle.

Michigan Wisconsin also provides the entire gas supply of 15 other distributing companies serving numerous communities in Missouri, Iowa, Wisconsin and Michigan. *In the Matter of Michigan Wisconsin Pipe Line Company*, 5 F.P.C. 953; 6 F.P.C. 1.[3]

Thereafter, in May, 1950, Panhandle applied for and received authority to increase substantially the capacity of its pipeline. Michigan Consolidated, faced with ever increasing consumer demands for gas, sought to obtain a share of this expanded capacity. Panhandle not only refused this request but applied to the Commission for authority to abandon 30 percent of its existing service to Michigan Consolidated at Detroit—a reduction of deliveries from 125,000 Mcf to 87,500 Mcf per day which would have created an immediate and critical gas shortage in the area.

The Commission denied Michigan Consolidated any portion of Panhandle's increased capacity and also denied Panhandle's application to partially abandon its service to Michigan Consolidated. Upon Panhandle's appeal, the Court of Appeals for the Third Circuit set aside and remanded the Commission's order denying Panhandle's abandonment application because of the relationship of that application to the broader question of the proper allocation of Panhandle's pipeline capacity among its various customers, which was also being remanded by the Court.

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[3] Panhandle attempted, without success, to review and set aside the Federal Power Commission's action authorizing the Michigan Wisconsin project, *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission* (C.A.-D.C.), 169 F. (2d) 881, *cert. den.* 335 U.S. 854, and also attempted, without success, to review and set aside the action of the Securities and Exchange Commission in approving the financing of the project. *Panhandle Eastern Pipe Line Co.* v. *Securities and Exchange Commission* (C.A. 8), 170 F. (2d) 453.

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Panhandle Eastern Pipe Line Company v. *Federal Power Commission*, 204 F. (2d) 675, 925.[4] At the same time, the Court affirmed the Commission's action in denying Michigan Consolidated any portion of Panhandle's increased capacity. *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 203 F. (2d) 895.

In sum, Michigan Consolidated has been denied any portion of Panhandle's increased capacity and is faced with that company's pending application for partial abandonment of its present deliveries.

Panhandle is now actively prosecuting its abandonment application before the Commission and is contending that the certification of the American Louisiana project permits such abandonment.

Although Michigan Wisconsin's capacity has been expanded to the full extent permitted by its presently available gas supply[5] and although Panhandle under the Commission's order has continued its deliveries in the existing volumes, the growing demands for more natural gas have resulted in a serious gas shortage in the communities served by Michigan Consolidated and Michigan Wisconsin. As a result, the Federal Power Commission and the State Commissions of Michigan and Wisconsin found it necessary to restrict the growth of the gas sales of the companies within their respective jurisdictions by imposing "stringent restrictions" upon the connection of new or additional gas loads (Pet. App. 18).

In order to meet what the Commission here found to be a "crying demand" for additional gas in the communities served by Michigan Consolidated and Michigan Wisconsin (Pet. App. 29), American Natural, their parent company, organized American Louisiana to transport gas from the

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[4] Further hearings were subsequently held by the Commission in the abandonment and allocation proceedings, which are now awaiting decision. 19 Fed. Reg. 1071-73.

[5] *In the Matter of Michigan Wisconsin Pipe Line Company*, 9 F.P.C. 152, 156.

prolific gas fields of Southern Louisiana to points of connection with the existing companies.

The construction of this new pipeline will make possible the elimination of stringent restrictions upon gas sales for both homes and industries which have been in effect for approximately five years and make new supplies of natural gas available in nearly 200 cities and towns, including many important industrial areas where gas is essential in the manufacture of goods vital to the economy of the country and necessary for the national defense.

Despite the fact that the gas to be delivered by American Louisiana will be in addition to and will not displace any of Panhandle's existing deliveries to Michigan Consolidated, and despite the fact that Panhandle was and is vigorously prosecuting before the Commission its application to partially abandon its existing service to Michigan Consolidated, Panhandle intervened in opposition to American Natural's application for a certificate of public convenience and necessity.[6]

After extended hearings and oral arguments, in which Panhandle fully participated, the Commission issued its opinion and order granting a certificate to American Louisiana. In its opinion, the Commission pointed out that Panhandle had not submitted any proposal to meet the additional needs of Michigan Consolidated and of the other customers of Michigan Wisconsin and specifically found that Panhandle would not be "aggrieved" by the issuance of a certificate to American Louisiana (Pet. App. 30).

Upon the filing of Panhandle's Petition for Review in the court below, the Commission promptly filed a motion to dismiss on the ground that Panhandle was not "aggrieved"

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[6] The fact that Panhandle was permitted to intervene has no significance since the Commission's Rules of Practice and Procedure (18 C.F.R. Sec. 1.1(f)(13)) provide that: "Admission as an intervenor *shall not be construed* as recognition by the Commission that such intervenor might be aggrieved by any order of the Commission in such proceeding." (Italics are supplied throughout this brief unless otherwise indicated.)

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as required by Section 19(b) of the Natural Gas Act. Motions to dismiss the petition upon the same ground were filed by American Louisiana, Michigan Wisconsin, Michigan Consolidated and Texas Gas. All of the other intervenors in the court below joined in these motions to dismiss.

Following briefs and oral argument, the court below unanimously sustained the motions to dismiss (Pet. App. 56-61), and thereafter denied Panhandle's application for rehearing (Pet. App. 61-72; 74).

ARGUMENT

Panhandle is in the anomalous position of opposing the construction of a new natural gas pipeline to serve Detroit and other communities in Michigan, Wisconsin, Iowa and Missouri despite the fact that it admittedly "does not wish to serve" the demand for additional gas in those communities (Pet. 19) and is attempting to *reduce* its deliveries to Michigan Consolidated at Detroit by 30 percent (Pet. 10, fn. 3). The Court of Appeals for the Third Circuit held that under these circumstances Panhandle was not "aggrieved" by the Commission's order authorizing the new pipeline. The petition for certiorari alleges, in an unrestrained fashion, that the Court of Appeals flouted well established principles governing the right to review administrative action. As we shall point out, the contrary is the fact.

One obvious primary purpose of Congress in limiting judicial review of Commission orders to persons "aggrieved" was to prevent the unjustifiable delay of projects of public service by litigations carried on by mere obstructionists. This case presents a clear example of the absence of a legal grievance in Petitioner and the need for a prompt denial of a baseless judicial review. Recognition of this situation undoubtedly moved the Court of Appeals promptly to dismiss the petition for review and makes it our duty to urge most earnestly that this Court by similar

timely action carry out the wise intent of the legal limitation of review to persons "aggrieved."

It should be noted at the outset that in Panhandle's Petition for Review "no factual allegations are given which support the contention that it is aggrieved," as the court below pointed out (Pet. App. 57). That court was unusually well acquainted with the background of the matters here involved since Panhandle's petition to review the Commission's instant order was the fourth recent case in that court involving Panhandle's deliveries to markets in Michigan and other states. As previously noted, that court, in *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 203 F. (2d) 895, had upheld an order of the Commission approving Panhandle's refusal of Michigan Consolidated's request for a portion of Panhandle's increased pipeline capacity. In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. (2d) 675, the court had held that the Commission had no authority to compel an enlargement of Panhandle's facilities to serve its customers even when additional capacity was necessary in order to remove discrimination. And in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. (2d) 925, the court had remanded the Commission's order denying Panhandle's application to reduce its service to Michigan Consolidated at Detroit from 125,000 Mcf per day to 87,500 Mcf per day.

Thus, the Court of Appeals was fully familiar with Michigan Consolidated's long and fruitless efforts to obtain more gas from Panhandle, with Panhandle's fixed resolution to reduce if possible its supply of gas to Michigan Consolidated, and with the very real and urgent need for more gas in Detroit and the other communities. Panhandle's unsupported assertion that it is "aggrieved" by the order authorizing construction of a pipeline to provide the gas that Panhandle refused to supply was, very properly, rejected by the court.

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(1) Panhandle Is Not a Competitor for the Additional Market Requirements to be Supplied by American Louisiana

Under the provisions of Section 19(b) of the Act, Panhandle was not entitled to a review of the Commission's order unless its petition contained factual allegations from which the court below could determine that Panhandle is "aggrieved" by the order.[7] Panhandle, an experienced litigant, could not and did not meet this requirement.

In its Petition for Review in the court below, Panhandle's theory of aggrievement was simply that its *present* sales to Michigan Consolidated at Detroit made it a "competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas within the meaning of Section 15(a) of the Natural Gas Act," and that, as such, it had standing to seek review (Pet. App. 3). Panhandle contended, in other words, that since it presently supplies a limited portion of Michigan Consolidated's requirements any new supplier of additional gas to that company is automatically a "competitor" whose authorization by the Federal Power Commission is sufficient to result in "aggrievement" to Panhandle.

The difficulty with this position is that it ignores the fact that, while some of the gas to be delivered by American Louisiana will go to Michigan Consolidated at Detroit, the demand which will be supplied by such gas is not that which is now supplied in part by Panhandle but an entirely new demand consisting of the *unfilled* needs and *increased* requirements of consumers in that area. And with respect to this demand, Panhandle openly admits that it has no desire to supply gas (Pet. 19). Quite the contrary, it is attempting to curtail the gas it now delivers to Michigan Consolidated at Detroit by nearly one third.

The Court of Appeals recognized the anomaly inherent

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[7] See, e.g., *Interstate Electric, Inc.* v. *Federal Power Commission*, 164 F. (2d) 485 (C.A. 9); *National Broadcasting Co.* v. *Federal Communications Commission*, 132 F. (2d) 545 (C.A.-D.C.), affirmed 319 U.S. 238.

in Panhandle's claim of aggrievement and stated (Pet. App. 59):

> "Whatever may be the outcome of Panhandle's effort to obtain authority for reduction of its supply of gas to Michigan Consolidated, the gas to be delivered to that concern by American Louisiana is not in displacement of any part of its Panhandle allotment but over and above it in order to provide for the *increased* requirements of the Michigan Consolidated territory.
>
> "Panhandle makes no offer of facts in its petition for review that would even tend to support any allegation that it is a competitor of American Louisiana, Michigan Consolidated, Michigan Wisconsin and Texas Gas for the *unsupplied* market."

Thus, even taking Panhandle's contention at face value, the court below concluded that Panhandle was not "aggrieved," stating (Pet. App. 58):

> "Whether or not it [Panhandle] is a competitor of these companies *for the present restricted markets* in the states of Michigan and Wisconsin is beside the point. * * * It has evinced no interest in trying to take care of the substantial *increased needs* which are the basis for the certificates of convenience and necessity issued by the Commission."

Apart from decisions which are tacitly recognized as beside the point (Pet. 16),[8] the cases relied upon by Panhandle in its petition for certiorari all reflect situations in which facts were alleged showing that the granting of the certificate would result in economic injury to a competitor. Thus, in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, this Court held that where the issuance of a license to a new radio

[8] Panhandle is not and does not claim to be a consumer or a representative of the consuming public. Accordingly, *Chapman* v. *Federal Power Commission*, 345 U.S. 153; *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C.A. 2) and *Reade* v. *Ewing*, 205 F. (2d) 630 (C.A. 2) are irrelevant.

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station would result in economic injury to an existing licensee, the latter had standing to appeal even though such economic injury was not a separate element that the agency had to consider.

Similarly, the three certificate cases under the Natural Gas Act upon which Panhandle also relies (Pet. 11-13) involved the displacement of existing sales which the petitioner desired to continue making. Thus, in *National Coal Association* v. *Federal Power Commission*, 191 F. (2d) 462 (C.A.-D.C.) certain coal operators, the United Mine Workers, and coal-hauling railroads demonstrated in their petition for review that authorization of the natural gas pipeline would result in loss of a market then being supplied with coal, to their great economic injury. *Arkansas Louisiana Gas Company* v. *Federal Power Commission*, 113 F. (2d) 281 (C.A. 5), involved a review by a company serving industrial gas consumers of an order authorizing another company to build a pipeline into the area and take over service to such consumers. And again, in *Cia Mexicana de Gas* v. *Federal Power Commission*, 167 F. (2d) 804 (C.A. 5), a public utility company serving the general public in a particular territory was held entitled to review an order of the Commission authorizing a pipeline company to invade that territory.

In its Petition for Review in this case, on the contrary, Panhandle did not attempt to make any factual showing that it was aggrieved by an order permitting another pipeline to serve a demand Panhandle has no desire to supply. The meager, conclusory averments of Panhandle's Petition for Review bear no resemblance to those referred to by the court in the *National Coal Association case*, for example, where the precise economic effect of the Commission's order was spelled out in detail in the petition for review. (See 191 F. (2d) at 466.)[9]

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[9] Panhandle's Petition for Review set forth in two places (Pet. App. 6, 7) the "naked assertion" of aggrievement but, as the lower court held (Pet. App. 57) and as Panhandle recognizes (Pet. 15, fn. 4), this "is not enough."

If Panhandle had desired to serve the *additional* market requirements which American Louisiana has been authorized to supply, it had ample opportunity to file a competitive application which it failed to do.[10] But when Panhandle admitted openly that it has no desire to serve the additional market requirements (Pet. 19) and made no claim of economic or other injury, the fact that it provides a portion of the *existing* gas supply of one of the communities clearly does not establish its aggrievement.[11]

The court below was fully aware of the decisions relied upon by Panhandle but quite properly held that they either had no application on the facts of this case or supported the conclusion reached by the court. There is thus no conflict between the decision of the Court of Appeals in this case and the decisions of this Court or those of any other Court of Appeals.

(2) Panhandle's Belated and Unsupported Claims Concerning Its Existing Deliveries at Detroit Are Without Merit

In apparent recognition that it was not "aggrieved" by an order authorizing service of the additional market requirements it "does not wish to serve" (Pet. 19), Pan-

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[10] See *Northeastern Gas Transmission Company* v. *Federal Power Commission*, 195 F. (2d) 872 (C.A. 3), *cert. denied*, 344 U.S. 818; *Kentucky Natural Gas Corporation* v. *Federal Power Commission*, 159 F. (2d) 215 (C.A. 6).

[11] Panhandle's belated attempt to show (Pet. 17) that it is a competitor of Michigan Consolidated because of Panhandle's desire to make direct sales to industries in the Detroit area (which was not mentioned nor supported by any factual allegations in the Petition for Review) represents mere obfuscation. As this Court made clear in condemning Panhandle's attempt to take over "the cream of the volume business without regard to the local public convenience and necessity," Panhandle cannot make any direct sales to industries in the Detroit area without first obtaining the authorization of the Michigan Commission. *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 329, 334. Since Panhandle has not obtained any such authorization, its present contentions in this regard are purely "speculative." *United States Cane Sugar Refiners Association* v. *McNutt*, 138 F. (2d) 116, 121 (C.A. 2).

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handle advanced several contentions which were neither mentioned nor factually supported in its Petition for Review. Pointing to the fact that American Louisiana and Michigan Consolidated are affiliates, Panhandle belatedly asserted that it does not now have an enforceable contract with Michigan Consolidated and advanced the conjecture that Michigan Consolidated might therefore "attempt to cut off Panhandle as a supplier" (Pet. App. 59). Because of this purely speculative possibility Panhandle then contended that it was entitled to maintain this review in order to protect its existing deliveries to Michigan Consolidated (Pet. 23).

These arguments have no merit, as we shall point out, and it is not surprising that they were but mere afterthoughts. The Petition for Review did not contain even the semblance of an allegation that Panhandle feared the displacement of its present sales to Michigan Consolidated.[12] The court below therefore was under no obligation to consider such contention.[13] Nevertheless, the court disposed of it in a footnote as follows (Pet. App. 59):

> "Without any factual allegation in the petition, Panhandle contends that if the proposed pipeline were constructed Michigan Consolidated might eventually purchase all its supply from American Louisiana. There is nothing before us giving the slightest support to the suggestion that Michigan Consolidated is not bound to accept its quota of gas from Panhandle; certainly no implication that it could refuse delivery

[12] Panhandle now emphasizes the fact that in its attack on the merits of the Commission's order, it assigned as error "the absence of substantial evidence" of an adequate market for the American Louisiana gas (Pet. App. 9, 12). Nowhere in its Petition for Review, however, did Panhandle relate this claim to any contention that its present sales to Michigan Consolidated would thereby be affected. Nor can any such contention be supported as we shall point out (*infra*, pp. 14-15).

[13] *Interstate Electric, Inc.* v. *Federal Power Commission*, 164 F. (2d) 485, 486, (C.A. 9); *National Broadcasting Company* v. *Federal Communications Commission*, 132 F. (2d) 545 (C.A.-D.C.) affirmed 319 U.S. 238.

from Panhandle without the authority of the Commission. Beyond that the case is barren of proof that Michigan Consolidated will attempt to cut off Panhandle as a supplier."

Moreover, Panhandle's tardy and gratuitous assertion that "Michigan Consolidated will cut off its purchases" from Panhandle "just as soon as American Louisiana can be placed in operation" (Pet. 24) overlooks the fact that the Federal Power Commission, whatever its direct control over Michigan Consolidated,[14] has complete control over American Louisiana's operations (as well as those of Michigan Wisconsin), including the volumes to be delivered to Michigan Consolidated and the terms and conditions under which deliveries shall be made.[15] Indeed, in its order authorizing the American Louisiana project, the Commission, in accordance with its usual practice, specifically reserved for further hearings and subsequent determination the "disposition" of the volumes of gas to be delivered and the sales of gas to be made by American Louisiana (Pet. App. 21, 32-33). Unless and until such further proceedings have been held, there is no possibility of American Louisiana displacing any of Panhandle's sales to Michigan Consolidated. The threat that Panhandle professes to fear is therefore both premature and "speculative." *United States Cane Sugar Refiners Ass'n.* v. *McNutt*, 138 F. (2d) 116, 121 (C.A. 2). Should the situation that Panhandle envisages ever arise, Panhandle

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[14] The Commission's authority over "city gate" service is in no way dependent upon whether the purchaser is a "natural-gas company" under the Act. Accordingly, there is no significance to the fact that Michigan Consolidated, an intrastate distributing company, was exempted from the Natural Gas Act by the Section 1(c) amendment of March 27, 1954 (68 Stat. 36).

[15] *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246, 251; *Public Utilities Commission of Ohio* v. *United Fuel Gas Company*, 317 U.S. 456, 466-468; *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 173 F. (2d) 784, 789 (C.A. 6).

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can obtain full protection of its rights from the Commission, which has ample authority to deal with such matters.

Finally, while it is true that Panhandle, over the strenuous objection of Michigan Consolidated, undertook to cancel its contract with Michigan Consolidated as of December 31, 1951, the notice of cancellation did not become effective because the contract was on file with the Commission as a rate schedule and because Section 7(b) of the Act prohibits any abandonment of service without the prior approval of the Commission.[16] Thereafter, the Commission prescribed the form of tariff for the Panhandle system and, contrary to the implication in Panhandle's petition (Pet. 22), the Commission continued Panhandle's contract with Michigan Consolidated in effect as an operative service agreement under that tariff.[17] In accordance with the provisions of this contract, which is still in force as a service agreement, Michigan Consolidated is obligated to purchase and Panhandle is obligated to supply Michigan Consolidated's "requirements of natural gas at Detroit up to a maximum volume of 125,000 Mcf per day."[18]

In short, Panhandle's present contention that it fears displacement by American Louisiana of its existing sales to Michigan Consolidated (despite the fact that Panhandle is now vigorously prosecuting its application to abandon 30 percent of those sales) was not presented to the court below by Panhandle's Petition for Review but was purely an afterthought, lately conceived to bolster an untenable position. It is without merit legally and without support factually.

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[16] This appears from the previously mentioned prior decisions of the court below in *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 203 F. (2d) 895, 899 (C.A. 3); *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 204 F. (2d) 925 (C.A. 3).

[17] See *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 203 F. (2d) 895, at 898 (C.A. 3).

[18] *Id.* at 899.

CONCLUSION

The decision below turned on the particular facts of this case and is clearly correct. There is no conflict of decisions and no need for further review. In view of the public interest involved in this matter, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied as promptly as possible.

Respectfully submitted,

DONALD R. RICHBERG,
1000 Vermont Avenue, N. W.,
Washington 5, D. C.

JOHN DERN,
ARTHUR R. SEDER, JR.,
Sidley, Austin, Burgess & Smith,
11 South LaSalle Street,
Chicago 3, Illinois.

CHARLES V. SHANNON,
Wheat, May and Shannon,
520 Shoreham Building,
Washington 5, D. C.

Attorneys for American Louisiana Pipe Line Company, Michigan Wisconsin Pipe Line Company and Michigan Consolidated Gas Company.

OSCAR L. CHAPMAN,
Pennsylvania Building,
Washington, D. C.
Attorney for Michigan Consolidated Gas Company.

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APPENDIX

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The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, 15 U. S. C. 717 *et seq.* are as follows:

* * * * * * * * * * *

Sec. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

Sec. 19(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission

as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

Sec. 19(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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